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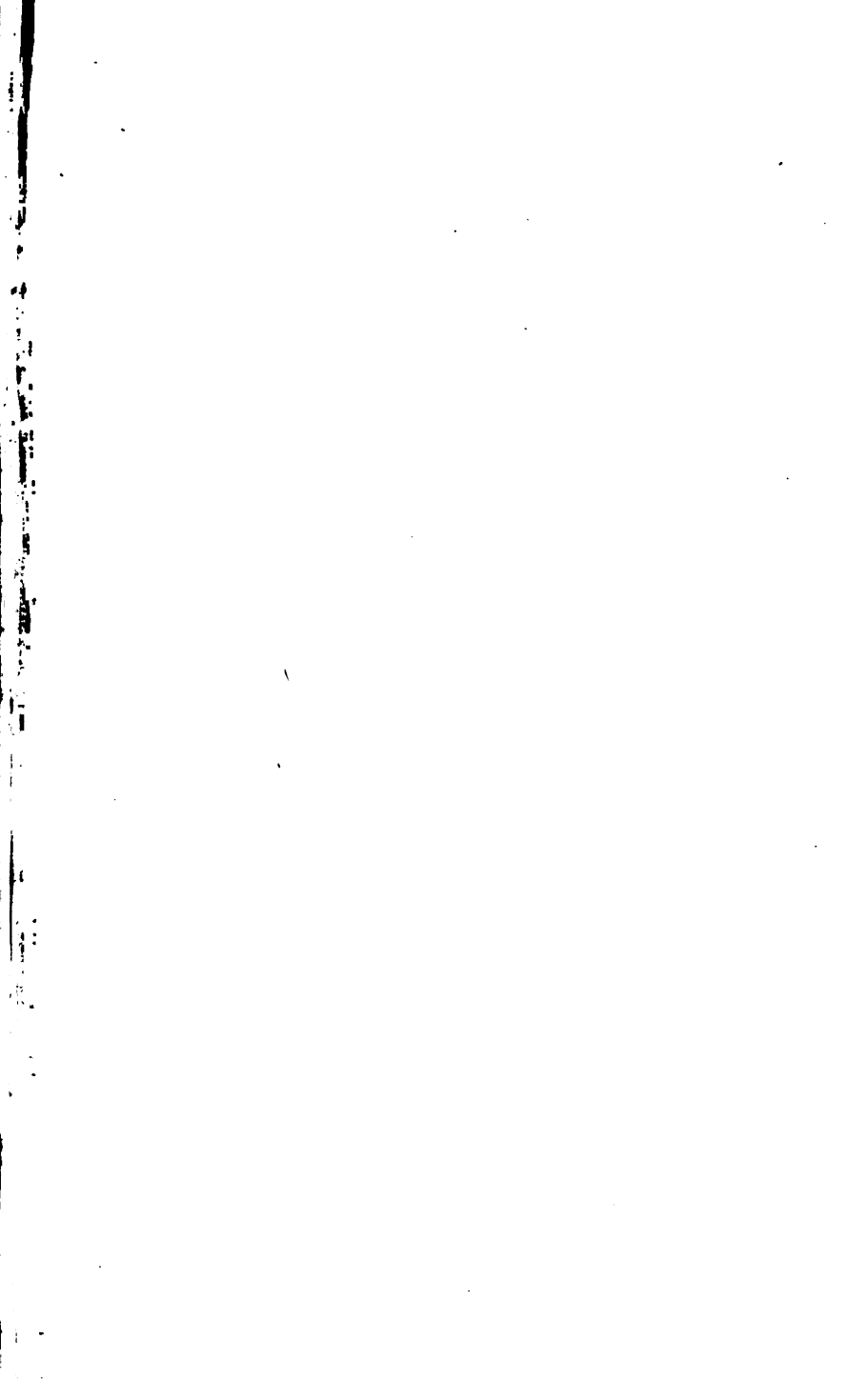
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GUIDE  
TO  
THE HISTORY  
OF  
The Laws and Constitutions of England,  
CONSISTING OF  
SIX LECTURES,  
DELIVERED AT THE COLLEGES OF SS. PETER AND PAUL,  
PRIOR PARK, BATH, IN THE PRESENCE OF THE  
BISHOP AND HIS CLERGY;

BY  
THOMAS CHISHOLME ANSTEY, ESQ.  
OF THE MIDDLE TEMPLE, BARRISTER AT LAW; PROFESSOR OF LAW AND  
JURISPRUDENCE IN THOSE COLLEGES.

---

Quæ si Consuetudo ac Licentia manare cœperit latius, Imperiumque nostrum, ad Vim,  
à Jure, traduxerit,—ut qui, adhuc, Voluntate nobis obediunt, Terrore teneantur,—etsi  
nobis, qui id Ætatis sumus, evigilatum ferè est,—tamen de Posteris nostris, et de illâ  
Immortalitate Reipublicæ, sollicitor;—quæ poterat esse perpetua, si patriis viveretur  
Institutis et Moribus. (*Cicero ; de Republica ; Lib. III. S. XXVIII.*)

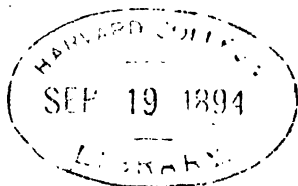
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TO CHARLES MICHAEL,

BY DIVINE PROVIDENCE, BISHOP OF PELLA ;  
VICAR APOSTOLIC OF THE WESTERN DISTRICT OF ENGLAND ;  
ETC. ETC. ETC.

MY LORD,

THE Lectures upon English Law, which I have now the Honour of inscribing to your Lordship, comprise the Introductory Course, delivered by me at your College, early in the present Year. In undertaking this Publication of them, I have been influenced by the same Consideration, which now leads me to inscribe them to your Lordship. The Chair of Law and Jurisprudence at Prior Park, which was of your Establishment, was also the First and only One, which had been planted, for the last Three Hundred Years, in any Catholic Seminary within these Realms. It would be little to the Purpose, to enquire, why

the Teaching of that Science should have been, thus and so long, neglected amongst us. It is enough that, by your Lordship, an Endeavour is now being made, towards the Revival and Resumption of that holy Office. I wish, on every Account, that you had found One, better gifted than myself, to aid in the Attempt. But, being the First whom your Lordship was pleased to select to fill the new Chair, I felt myself bound to acquiesce in your Selection; and to do my best, so to discharge myself of the Duties imposed upon me, as, at Once, to carry out the Objects which I knew your Lordship to have in View, and to vindicate, to others, the Wisdom and the Practicability of the Experiment. When I entered upon my Functions, as your Professor of Law and Jurisprudence, such was my Thought;—and I kept it steadily before me. And now, moved by the same Considerations, I venture to give to this First Fruit of my Labours a wider Circulation, by Means of the public Press.

To the Undertaking, peculiar Difficulties opposed themselves. What those were, I have endeavoured, in my Introductory Lecture, to explain. But they may be all summed up under One Head;—the pre-

vailing Heedlessness and Ignorance of our Age and Race. It was impossible to bestow, upon the Subject before me, the most cursory Attention, and not to see, that any History of the Laws and Constitutions of England which might be written, could be nothing but a Chronicle of successive Stages of Decline, already reached, on the downward Passage to Destruction. In that Sense only, there had been a Progress. But, in the popular Acceptation of the Word, there had been the Reverse of Progress. Hence, at the very Outset of my Labours, I was met by a mass of Prejudices and Misconceptions, which form the popular Learning on what is called the Constitution; and against them I have had to struggle, with considerable Disadvantage, to the End.

Of the Manner, in which I have, thus far, wrought out, what I had set before me to accomplish, it does not become me either to affirm or to deny. There is no Critic, however unfriendly, who is likely to be more ready than myself, in finding Fault with my Performance. If it have any Worth, that Worth consists not in what it has fallen to my Part to contribute,—nor, on the other Hand, is it to be depreciated because of any Deficiencies of mine. The

Gravity of the Subjects discussed,—and whatsoever of the Wisdom and Learning, treasured up for Ages, I have been enabled to glean, for elucidating the Discussion,—constitute its only Title,—and that no unimportant One,—to the Attention of those into whose Hands this Volume may chance to fall.

To your Lordship,—than whom none more perfectly appreciates the high and comprehensive Obligations of your illustrious Order,—the humble Information, upon Matters of great Concernment,—alike to the individual Penitent as to the Community at large,—which is contained in these Pages, may, in the Performance of those Obligations, be not unfrequently found a serviceable Auxiliar. The ridiculous Endeavour, lately made, by a small Parliamentary Faction, not without Countenance and Support from some of the less instructed amongst their Catholic Opponents, to revive the stupid and unmeaning Clamour of other Days, against sincere, or as they term them, Ultramontane Catholics, will, by your Lordship and your Brethren in the Episcopate, be estimated at its proper Value.

Rome has never withdrawn Her Guidance from Her Children—has never abandoned them to the Anar-



chy of their Passions. She is with them still, for their Admonition and Support,—in whatever Relation of Life they may be placed,—or whatever may be the Temptations to which they are exposed. To Her, those factitious Distinctions,—of Temporal and Spiritual, or of Morals and Politics,—which beguile the Judgment, and pervert the Conscience, have no Significance nor Value. We are taught to know, and to feel, that there can be no temporal Concern whatsoever which has not its spiritual Aspect,—and that Politics, which are but the Morals of the State, are of Obligation for every Citizen within it.

Let it not be said, that this is merely a Question about Words, which have no Value. The astute Libertinism of the Day, fitly represented by the daily Press, has a far other Conception of the Importance of Words, for Evil or for Good. As if Law, and the Breach of Law, were Terms convertible and synonymous, Faction is confounded with Politics; until the Minds of the many become prepared to receive the heretical Axiom, that the Church ought not to concern Herself with the former. Undoubtedly, the Deceit is of a most dangerous Consequence, to those who

are stupid enough to be made its Dupes. But the Wonder is, that so apparent a Fallacy should ever have gained Ground amongst us.

I am happy to know, that it is One which, far from being shared in, or connived at, is altogether disowned and condemned, by the highest Ecclesiastical Authority within the antient Kingdom of Wessex.

I am, My Lord,

Your Lordship's faithful

and obedient Subject,

T. CHISHOLME ANSTEY.

*(Professor of Law and Jurisprudence in the Colleges of  
SS. Peter and Paul, Prior Park.)*

54, CHANCERY LANE,

14 June, 1845.

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# **GUIDE TO THE HISTORY**

## **OF THE**

### **Laws & Constitutions of England.**

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#### **LECTURE I.**

##### **INTRODUCTORY—ORIGIN OF LAWS—PRESENT STATE OF THE SCIENCE.**

I HAVE no Excuses to offer to you for the noble Pursuit to which I invite you ;—the Study of the Institutions of England and her Laws. I should rather apologise for my Incapacity to do it Justice ;—for the Distrust of my Audience which an Invitation so superfluous may seem on my Part to imply ;—and for my own Presumption in making it.

In a Community of Freemen, there can be no Pursuit which deserves to be esteemed Liberal in Comparison with this.

In a Community, where Christianity hath hallowed and enforced the anterior Obligations of Citizenship, no public Duty ought to be held more sacred.

Where every Native of the Soil is born a Citizen, and invested from the Moment,—and by the mere Accident,—of Birth, with the Solemn Responsibilities belonging to that Character, the Knowledge of these—as it is to him the

hereditary Science of his Calling—so it should be the earliest and chiefest and most constant of his Studies.

A Code of public Morals,—a Code not only of Human but Divine Sanction,—enforced by Spiritual Censures as well as Temporal Punishments,—and binding the Conscience of each as it binds the Action of all,—a Code, in Fine, whose declared Maxim it is (*a*) that the Ignorance of the Transgressor shall in nowise extenuate the Transgression,—such a Code should find, on the Part of its Subjects, few Occasions indeed for the practical Application of that Rule.

Like the Pursuits of Literature and Art to the Rhetorician of Old, these, which have so many more and so much higher Qualities concurring to recommend them, should present an Attraction altogether independent of Season or Condition. Other Acquirements might be wanting. Tastes, Abilities, and Opportunities might not permit all to make the same Election in other Departments of Knowledge, or to win the same Success. But this should be the common Ground where all might meet! This Science, necessary alike to all, and equally adapted to every Rank of Capacity and of Fortune, should be the one Science cultivated every where and by all. Simple and yet profound, it might reasonably be taught as one of the most elementary Branches of Instruction to the Young in the poorest Village School, at the same Time that, inexhausted in its Lore, it ceased not to afford Matter of severe and absorbing Research to the Statesman and to the Sage. The Advantages and Inconveniences of Life, which so much assist or else detract from the Prosecution of other Studies, the Balance of which it is always difficult and at Times impossible to adjust, have no Application to these,—compared with which all the rest sink into the Shade. It was therefore but natural

(*a*) Ignorantia Juris non excusat. (Noy's Maxims.)

to expect that they would be met with amongst every Order of Society, under every Dispensation of Providence, and in every Stage, Mode, and Condition of Life. Easy of Access from the lowest Estate, they might well have excited the Ambition of the loftiest.

Yet, notwithstanding these Inducements, and many more at which I have not glanced, this noble Science has not only failed to secure its proper Place in every College, and Seminary, and School, in the Kingdom; but, except by those destined to the legal Profession, where it is cultivated more as an Art than a Science, is scarcely studied at all.

This lamentable Neglect may have resulted from various Causes, but to enumerate them all would be unnecessary as it is difficult. It suffices to specify one Cause,—apparent to the most superficial Observer, and quite adequate to the Effect.

I have already remarked, that, even amongst the Professors of that Science, the Law is too generally considered more as an Art, or Occupation, than as a Science. It is true that they consider it, or at least talk of it, as if it were a learned Profession;—but my Experience leads me to doubt whether they use those Words in a scientific Sense. For the least honourable Trade,—the meanest Avocation,—possesses a Kind of Learning,—a “Mystery,” as the Term once was,—of its own; and the slightest Proficiency in his Craft is always something to elevate the youngest Adept, in his own Judgment, above the Level of ordinary Men. But Acquirements of this Kind furnish not the most distant Affinity to that higher and more excellent Knowledge, which, by the Common Consent of every Nation, and every Age, and every Tongue, is pre-eminently and emphatically called Science. The Spirit of this Age is fruitful in Theory; and every Novelty has its Followers. But there are Barriers even to Caprice.

There is an Instinct against which not even the Complacency of the Multitude for Change will let them rebel. It is not given to us to change the Nature of Things. To destroy is never very difficult. To create is always impossible. And the System, which proceeds upon a Contempt for every former one,—which sets Nature and Her Laws at Defiance,—and, breaking up all established Orders and Distinctions of Class, pretends to replace them by the Arbitrary Inventions of others,—is self-convicted of Imposture and Folly, and wears its own sentence branded upon its Brow.

I do not deny the Competence of the Professor of any Science to deprive himself of the honourable Pre-eminence which in that Character belongs to him, or that, by his Method of Profession, he may succeed in reducing it to the Level of the most ignoble of Occupations.

I have indeed too much Reason to affirm that it is a Case of the commonest Experience. Ignorant Men abound in every Profession; and dishonest Men are not unfrequent. There are Simonists in the Church,—there are Empirics in Medicine,—there are Barrators in the Law.

It is always in the Power of such Men to degrade the Reputation of their Science by their Teaching as they disgrace it by their Conduct. But the Grade to which they lower their own Grade, is not exalted by such Fellowship. The Equality, indeed, has been effected; but only by degrading the Science to the Level of the Art, and not by elevating the Art to the Order of the Science,—“You do not,” as the Poet Coleridge once said, “You do not Aristocratise the Trade, but you Plebeianise the Profession!”

“Whence,” I heard it once demanded by a distinguished Member of the Bar, now unhappily no more,—“whence have we those biting Terms of Quack and Pettifogger?”



They denote not the learned of either Profession, but the Pests of both ;—the Harpies, to whom the Sacred Robe of Science is useful only to hide their rapacious Ignorance, and their brutal Recklessness,—the St. John Longs of Physic ; and, if there are such, the St. John Longs of Law !” (δ)

This exclusive Pursuit of the legal Occupation has well nigh extinguished among its Professors the Science of Law itself. For even amongst Lawyers, there are few who can discover in the Science with which they are supposed to be familiar, more than an Art to be practised,—and that, too, not the most honourable of Arts.

It is in this discreditable State of the legal Profession, and for Want of a sound and practical Acquaintance with the First Principles of the Science, that the visionary Opinions of the last Century, and of the present Day, have now the Force of Law with so many who are otherwise entitled to their Reputation of learned Lawyers. It assorts obviously well with such a Condition of Mind to believe with Locke and Rousseau that Law is the arbitrary and unscientific Invention of Man, and the Creature of a Compact,—that the Natural State of Man is the savage State,—that civil Society came after savage Life, and Law after Society,—and that Civilisation is an artificial Mode of Existence, purchased to Man by the Surrender of his savage Rights, and his voluntary Accession to the Social State, and to the Laws by which,—preserving nevertheless every abstract Right to renounce those Laws and to abandon Society again for the Woods,—he, whilst a Member of Society, permits himself to be governed. In this celebrated Theory of the Social Compact the whole Scheme of Society and Law,—as it originated in the Caprice of Savages,—so it subsists at the Pleasure of their reclaimed

(δ) Henry Nelson Coleridge, Esq., late of the Chancery Bar.

{ Descendants ; and Law, you will observe, instead of preceding Society, began last. Hence it is concluded that Society and Law, and more especially the latter, are essentially finite. They began. Therefore they may cease to be. It is one of the Rights of Man to have Power over his own Handiwork, to destroy it.

I cannot see how those, who adopt the Premiss, can refuse to accept the Conclusion logically resulting from a Proposition, which is utterly false. There is then no Way left to escape the Conclusion but by ascending to the Source. Neither Society nor Law came of the Wit of Man. They belong to him indeed, but only as the Gift of Language may be said to belong to him ;—for with that Gift he derived them through primordial Revelation from God. With Language, and long before the Possibility of any Compact, Man received and understood the great Truths of the Moral Law,—the primitive and fundamental Law,—“the Law,” says Demosthenes (c), “whereunto all Men do owe Obedience, for it is a certain Revelation and Gift from God Himself.” We are “all born in Subjection,” to use the noble Language uttered on a solemn Occasion by our own illustrious Patriot Mr. Burke (d), “all born equally, High and Low, Governors and Governed, in Subjection to that One great immutable pre-existent Law ; prior to all our Devices, and prior to all our Contrivances ; paramount to all our Ideas and all our Sensations ; antecedent to our very Existence ; by which we are knit and connected in the Eternal Frame of the Universe, out of which we cannot stir.” “A Law,” exclaims Cicero (e), “which no Wit of Man did ever devise, nor was it enacted in

(c) Apud Marcian, Lib. II.

(d) Speech on Hastings' Impeachment, Fourth Day, February 16, 1788. Burke's Works, Vol. VII., p. 116, (American Edit.)

(e) De Legibus.

Assemblies of the People ;—but everlasting, and swaying all the World by the Wisdom of Commandment and Reproof ;—the Sovereign Law ;—the final Mind of God ;—compelling what is right and forbidding what is unseemly.”

This great Law did not arise from our Conventions and Compacts. They received from that all the Sanction they possess. “ It does not,” says Burke (f), “ arise from our vain Institutions. Every good Gift is of God. All Power is of God. And He will never suffer the Exercise of it upon any less solid Foundation than that Power itself.”

Law is necessary to Man,—was not made by Man,—and is beyond the Power of Man to abrogate. Society is the Child of Law ; for it is by Law that the Duties of Man to man are pronounced and imposed ;—the Relations of Marriage constituted ; those of Parent and Child superadded ; and in the First Family Society itself established. The Relations of Family to Family again are determined by Law, which in that Regard becomes the Law of the State, as it does afterwards, in determining those of State to State, become the Law of Nations.

I cannot insist too strongly upon these Considerations. It is for Want of such that every Species of Error has been taught and imbibed in our own Times and those immediately preceding them. What can be more corrupt in itself, or a greater Cause of Corruption in others, than the Distinction so constantly taken between Law and Politics ?—between Law and Canon Law ?—between Law and the Constitution ? In Fact, no Ground of Distinction exists in either of these imaginary Contrasts. The Politics of a State are the Public Laws of that State, and of every one of its Citizens. They have no other Politics. The

(f) *Ubi supra*, p. 117.

Canon Law, as its Name sufficiently imports, is as much the Law of the Realm,—and, in its Sphere, as binding upon the Citizens,—as any Law Temporal can be, Public or Private. The Constitution is made up of the whole Body of Laws, Temporal and Ecclesiastical; and in Fact, it is but a Synonym of Modern Invention for the Law itself. You will hence perceive the Absurdity of the Vulgar Phrases of the Day, “A Free Constitution,” “A Liberal Constitution,” as equivalent to “Free Laws,” “Liberal Laws,” and the like. To say of a Constitution that it is “just,” or “wise,” or “sound,” is proper, is intelligible;—but perhaps for that very Reason precisely one of which the Authors of the current Phraseology are the least desirous. In like Manner it is common to every Faction,—whatever their contending Doctrines may be,—to describe Countries governed in one particular Manner as “having a Constitution,” and others not governed in that Manner as “not having a Constitution.” Of Course, where there are no Laws,—or where Anarchy prevails, so that they cannot be enforced,—or Antinomy, so that no one will attempt to enforce them,—there is no Constitution; and of the Lawgiver who imposes, or of the Avenger who restores the Law, it may well be predicated that he has given a Constitution to his Subjects. But in the common Acceptation of those Words they are undoubtedly senseless and repugnant.

The Time has been when these simple and obvious Propositions needed no Enforcement. But for more than Three Centuries this Empire has been incessantly declining with a Rapidity increasing at every Step. There is organic Disease in all its Members; but the Extremities are torpid, and the Centre is fevered with a wild and unnatural Energy. The Harmony of the system is no more. The Life of the whole and the Functions of each Member are at Discord;

—and, as if abandoning all Hope of Restoration, the Physicians of the State are abroad in Quest of Palliatives. Nor are they happy in their Selection. Losing Sight of the Two essential Conditions of the State,—Community of Life conjoined with Diversity of Functions,—they would preserve the First by destroying the latter; and extinguish one by one every Organ, in the vain Hope thereby to purchase a few more Hours of Lethargy for the unprofitable Trunk.

The Distinctions of Jurisdiction, the Privileges of Courts, the Immunities of Orders,—every Departure, however venerable, from the harsh Letter of Regulation, and the dull Uniformity of Practice,—all these, and such as these, are exposed to the jealous and implacable Hostility of the Modern School of Opinion, and its incessant Pursuit. The nearer we approach to the Times in which we live, the more frequent and the more strongly marked become the Instances which certain Legists,—I will not call them Jurists,—offer of this Malignant and Erastian Spirit. St. Germain, the last English Catholic Jurist, wrote immediately before the Reformation; and he unquestionably is very free from this great Stain. Yet before the Reformation its Progress must have been already frightful; else how came that miserable Degeneracy upon the Land? Of Cranmer it is unnecessary to speak. Lord Bacon's Life and Writings may fitly illustrate each other. Yet,

“The Greatest, Wisest, Meanest of Mankind,”

Was exceeded in the slavish Part by his Successor, Lord Coke—“the fittest Engine for a Tyrant,” as his Master, James I., told him on the Occasion of his final Disgrace, “that ever was in England.” In the Works of Lord Coke are to be found the most unequivocal Indications of the alarming Growth of the Servitude of the new Learning upon the free antient Domain of English Jurisprudence. Yet

Decline is a Term of Comparison. If Coke was unworthy to be ranked with St. Germain, who preceded him only by one Generation, there is scarcely a Jurist of succeeding Times who deserves to rank with Coke. *Nemo repente turpissimus* is a Maxim at least as true of Nations as it is of private Men. Each succeeding Page in the Annals of Decline is darker than the Last. The Generation, which inheriting the Example of parental Crime fails to make Profit of the Example, will inevitably imitate and improve upon the Crime; and so transmit it to the Generation that comes next in Succession, to be dealt with in like Manner.

“Ætas Parentum pejor Avis tulit  
Nos nequiores, mox daturos  
Progeniem vitiosiore.”

And except the Scandal of the First Example and the Reproach of Paternity, (a great Reservation doubtless,) the Generation which witnessed the Commencement of Decline must have been far less guilty than the one, in whose Time that Decline is consummated in the Ruin of the State.

As amongst modern Writers, Sir William Blackstone, the Commentator on the Laws of England, is unquestionably the ablest, so also among them all perhaps there is none to be found so strongly tainted with this Mania for Centralisation in Church and State. It has been well said of his Commentaries,—that, although the most elegant and best digested of our Law Catalogue, they have perverted more than all others to the Degeneracy of legal Science.

Blackstone lived in the early Period of the Reign of George III. Before his Time, as we learn from the great Virginian Jurist of that day, (g) Lord Coke's Commentaries upon Littleton's Book of Tenures (commonly called Coke Littleton) was the universal elementary Book of Law Students. “A Man,” he observes, “of profounder

(g) Mr. President Jefferson.

Learning in what he terms the Orthodox Doctrines of the British Constitution, nor in what were once called English Liberties, never wrote.”—“ But when his black Letter Text and uncouth cunning Learning,” he goes on to say, “ got out of Fashion, and the honied Mansfieldism of Blackstone became the Student’s Hornbook, from that moment that Profession began to slide into Torpor; and nearly all the young Brood of Lawyers are now of that Line !” (A).

Certainly no Book ever acquired so general a Popularity of a sudden, and retained it so long. Mr. Burke mentions a curious Incident in Connection with this Fact. In his Speech on Conciliation with America, he says of our revolted Colonies there,—“ In no Country perhaps in the World, is the Law so general a Study. The Profession itself is numerous and powerful; and in most Provinces it takes the Lead. The greater Number of the Deputies sent to the Congress were Lawyers. But all who read,—and most do read,—endeavour to obtain some Smattering in that Science. I have been told by an eminent Bookseller, that in no Branch of his Business, after Tracts of popular Devotion, were so many Books as those on the Law exported to the Plantations. The Colonists have now fallen into the Way of printing them for their own use. I hear that they have sold nearly as many of Blackstone’s Commentaries in America as in England.”

Both as a Dependency of Great Britain and as a free State, America has been the celebrated Birthplace of great Lawyers and scientific Jurists. To her Kents, her Marshalls, her Walworths, and her Storys, Westminster Hall can now oppose certainly nothing that is superior, or perhaps even equal to compete. If, then, the evil Influence

(A) Jefferson’s Letters; *apud* Professor Tucker’s Life of Jefferson, Vol. II. pp. 361, 547, (London Edit.)

of the School of Blackstone was even in hostile and republican America such as Burke and Jefferson describe it to have been in their Times, you may form some feeble Estimate of what that Influence was in England, and what it is at the present Day, and what are the Consequences which it has produced. Whatever that Estimate may be I will nevertheless venture to say that it is more likely to fall short of the Truth than to exceed it.

In coming to this important Study, the modern Enquirer has to unlearn almost every Notion respecting it which he may have previously gathered from the Speech of the Day. Law is not that Thing which the Word in its modern Degeneracy is made to represent. Great is the Value of Language. Without it the Generation of Ideas is impossible. We must think our Speech before we can speak our Thought. Before the Intelligence of a People is corrupted, the Corruption of their Language must have taken Place. The Restoration of such a People has to follow the same Order.

I deeply regret my Inability to devote to these awful Considerations the Leisure essential to their Development. I am obliged to regard the Narrowness of the Space allotted to my First Course of Lectures, and to pass on to the Commencement. At the same Time I have the Consolation to know that this Course of Lectures is merely elementary, and introductory to those which are to follow. What I must leave untouched to-day, may be resumed hereafter. At present I have but reached the Point at which our future Investigations into the important Matters before us must commence ;—and without further Prelude, I proceed briefly to sketch the Outlines.

Law is the Rule and Measure of Moral Conduct, commanding what is Good and forbidding what is Evil ; so that according to the Conformity or Non-Conformity of the



Actions of Man to that Standard, they are morally Right or morally Wrong (i). I quote the Language of the most approved Authorities. As Jurists, S. Thomas and Suarez possess almost the same Authority in Westminster Hall, as, in their Character of Theologians, they enjoy at Rome. This is their Definition of the Term Law. You will see that it suggests to all, Lawyer and Laic, momentous and awful Considerations. I need not add, therefore, that those Considerations do not in general attach themselves to any of the Definitions of the same Term in vulgar Acceptation amongst us.

Leaving to those learned and reverend Personages, to whose immediate Province it belongs, to explain to you in what Manner the Application of that Rule and Measure of Conduct is itself regulated, and the mysterious Analogies subsisting between it and the Divine Nature of its Law-giver and His Relations with Man, let me only remark, that, as merely the Actions of Man are determined by Law, so it corresponds in that outward Sphere of Existence to the inward Prescriptions of the Conscience. Law and Conscience therefore are essentially distinct Jurisdictions, although kindred, co-ordinate, and springing together from one Source. The Authority of Law is inapplicable but to some Fact—some “overt Act”—to use the Language of English Jurisprudence, whether of the positive or of the negative Character; but Thoughts and Desires,—not manifested outwardly,—these the Law abandons to the Conscience. When therefore, as a great Jurist has remarked (k), and as too often happens, we see Law on the one side, and Morals and Conscience on the other, we must not wonder at the Conflict. It is but one of the Con-

(i) Summa Theol. S. Thom. 1. 2, Q. 56 Q. 90. Art. I. Suarez de Legibus, lib. i. cap. I. s. 5.

(k) Professor de Moy, On the Philosophy of Law (Lecture III.)

sequences of the Fall of our First Parents,—whereby all the Elements of Existence were brought into a state of Schism, and the primeval Harmony of the outward Manifestation with the inward Essence destroyed. Under these Circumstances, all that the Law requires of us is to maintain, respect, and cultivate in our exterior Action so much of the Traditions of Man's primeval Likeness to his Maker as have survived to us. That antient Life the Law represents not in its Entirety, but by Fragments,—wholly inadequate therefore to the inward Essence of Man, but of an immense Service nevertheless, as protesting,—in the Name of the Past whence he hath come, and the Future whither he is hastening,—against a further Degradation. The Office of Law is to preserve Humanity;—that of Conscience is to elevate and to develope it. Law is to Conscience an Instrument and a Support whereby to keep itself from falling. But Conscience is the Soul of Law, which, when inspired by Religion, ascends to God, and shall hereafter restore the primeval Coincidence of both, as they subsisted before the Fall, remould the Form in its ancient Conformity to the Essence, and unite Earth once more with Heaven.

In the mean Time, and whatever the Degree of his own personal Depravity, Man is still governed by the Law of his Nature, which, as Sacred Writ informs us, was formed in the Image of God. He is still Lord of the Creation, disposing thereof according to his Will. He is still the free Master of that Will; and with its Help, when aroused and strengthened by Grace, still free to work out his own Union, and that of all Creation, with God. These constitute to him his Three great Spheres of Action,—and consequently of Law, the Rule and Measure of that Action. Within either Sphere, whatsoever answers to the great End of Man's Existence is properly accounted Just;—whatsoever is opposed to that End is Unjust.

1. In the First Instance, Man is considered as the Manifestation here on Earth of the Godhead in whose Image he was created—that is to say, as combining Community of Life with Distinctions of Persons. These Relations constitute the State; in other words, the Sphere of Public Law or Politics.

2. In the Second Instance, he is considered as combining the natural Freedom of his Person with his natural Rights over Things,—Relations which constitute the Sphere of Municipal or Private Law.

3. In the Third and last Instance, he is considered as a Child and Subject of the Church to whom alone and to whose Ministers God hath confided the Accomplishment of the Work of his Spiritual Regeneration. The Institutions and Laws appropriated to that mighty Object constitute the Sphere of Canon or Ecclesiastical Law;—the highest Sphere, and the only one with which I do not mean to occupy your Attention; for, standing where I do, I feel that that would be as little required by you, as in me presumptuous.

I must, however, guard you against supposing that these Three great Departments of Law are of more than one Source,—or that they do or can exist in a state of general Opposition to one another, or even of Isolation. Far from that. They are but the Developments of one and the same primitive Institution coming from the immediate Hand of the Almighty;—and they are so closely knit, so intimately blended, that the Existence of each of them pre-supposes the Existence of the other Two, and is even impossible without it; inasmuch as it is only in their Combination that they represent the Image of God, as manifested in the Existence and Action of Humanity. He founded Property, when he gave to Man Dominion over the Earth, and commanded him to till it. He founded Society, through the

Institutions of Marriage and Family ;—the First Seat of natural Revelation—the First School of civil Obedience ; without which, Language, Knowledge, Order, were impossible. He founded his Church not merely upon the common Descent of Her Members, but upon their common Hope of Redemption from the Fall,—a Hope as antient as the Fall itself, and inspired by Himself the Day He drove them forth from Paradise. These great Spheres of Law are no more susceptible of Fusion, the one with the other ; than are the Earth, the Air, the Fire, and the Water, or the Bounds prescribed to the Elements. But the Multitude of Creatures constitute but One Creation, and the Law of God is One in itself, and One in its Object, notwithstanding the Triple Method of its Working. Consider for a Moment that Operation. The State is organised in its Community of Life and Distinction of Functions ;—for what immediate Object ? That, under the Protection of the Body Politic, the Private Rights of Property may be made available ;—to what End ? To the Reconciliation of all Creation, and of Man the Lord thereof, with their Creator, according to the Laws prescribed by the Church. Citizen, Proprietor, Churchman, the Man remains the same ; it is the Person alone that varies, according as he is considered in his Political, Civil, or Ecclesiastical Capacity. It is the same with the Law by which his Rights are determined. In each corresponding Sphere there is something specific which predominates, and by which that Sphere is distinguished from both the others. In Public or Political Law, the predominant Character is Subjection. In that of Private or Municipal Law, it is Equality. In that of the Church, combining the Characteristics of the others, it is Freedom,—the Freedom of the Subject. These Three Spheres constitute together but one Law,—and, specifically different, are still the same in Essence.

These are the great Foundations on which every Order of Society is necessarily based. They are the very Elements of the English Constitution, as of every Constitution in the World deserving to be styled such. They contain, in Germ, the whole Code of English Law. May they never be forgotten in the Practice!

Such, then, is the Nature of this Sacred Deposit now placed, for the Benefit of all our Citizens, in the hands of a few. But, if those few have the Key of Knowledge, and yet will not enter in, can we wonder that the Many do not seek Admittance? It should not appear surprising that those without are not more careful of the Defence than the Keepers within. The Science of Law was once the Possession of all as it is still their Birthright. It is now in Practice the Monopoly of a Class. If the latter have ceased to comprehend the Value of their Gain, can we marvel that the former should have ceased to remember the Greatness of their Loss?

Before I quit this Part of my Subject, I have to call your Attention to certain Inaccuracies of Expression common enough in modern Writers, and which, if left unexplained, may possibly hereafter present some Difficulty. Once for all I must warn you that, when you prosecute these Enquiries, you will meet with many a Stumbling-block of that Kind in your Path. You will do well to disregard those which you cannot explain, satisfied that the Difficulty is rather in the Words of the Writer than in the Matter of the Subject. It may perplex you for Instance to be told, after what I have said of the Unity of the Law, that,—in some recorded Judgment of some Court of Judicature,—the Common Law, or the Law of Nations, or the Civil Law, or the Law of Prerogative, commonly called Equity, have no intrinsic Force or Validity of their own within that par-

ticular Court,—that their Maxims and their Rules are regarded there not as Laws to bind, but merely as Matters of Evidence to inform,—and that, in giving or refusing Effect to such, that Court has and exercises the same absolute Discretion, as in other Questions touching the Reception or Sufficiency of Evidence. No Doubt there are such artificial Expressions as these not unfrequently occurring in the Books;—and from the Misapprehension to which they constantly give rise, it is in my opinion difficult to lament them too much. Still they are but Expressions; and all that they mean is this. By the Constitution of this Realm, there are established a great Variety of Courts for the better Despatch of Public Justice, each having assigned to it some special and predetermined Department. Within its own Department each has the supreme and undivided Jurisdiction. In giving Aid or Effect to the Jurisdiction of any other Court, each is guided by the Maxims and the Practice of its own peculiar Department; unfettered, and,—save so far as its Discretion chooses,—uninfluenced by those of the Department administered by the other Tribunal. Thus the Law of Nations, though an undoubted Part of the Law of England, is beyond the Competence of, and as it were something foreign to what are called the Ecclesiastical Courts or Courts Christian. Equity, certainly a most important Branch of the Law, has its own Courts, and can no more be pursued at Common Law than can an Action at Law be pursued in a Court of Equity. The Laws of the Catholic Church,—although, as Lord Mansfield has shown, undoubtedly the established Law of the Land ever since the passing of the First Relief Act, —are incapable of being enforced directly by any of the Temporal Tribunals, but are left to the Jurisdiction of the Pope's Vicars Apostolic,—an undisputed and in more than

one Instance a solemnly recognised Jurisdiction (*k*), and as such entitled to Protection and Assistance in the last Resort in the Temporal Courts of Justice. Undoubtedly those Temporal Courts have no Judicial Knowledge of the Canons of our Church ;—neither has our Church any Judicial Knowledge of those of England. In both Cases, the Question of what are those Laws is one of Fact, of Evidence, and to be proved to the Satisfaction of the Tribunal requiring it. But when it has ascertained them, and that they contain nothing which is directly opposed to its own jurisdiction, I am sure that it is the Duty of the Court Temporal, and I submit to the Learning of Theologians if it be not equally the duty of the Ecclesiastical Power, to enforce by every Sanction, whether of Reward or of Penalty, belonging to its Resort, the Authority of the Co-ordinate Jurisdiction. Herein consists the only real and solid Union of Church and State—an Union which the Strongest of Fiscal Bonds must ever be too weak to accomplish.

The following Passages, from Mr. Bowyer's Work on the Constitution, have a distinct Bearing on this Part of my Subject. The learned Author probably intended to confine them to the Authority of the Protestant Episcopal Church as by Law established. His Observations however are quite as applicable to the Catholic Church within these Realms as to that Establishment.

“The Doctrine of Hale and Blackstone,” says Mr. Bow-

(*k*) In the *Sussex Peerage Case*, Dom Proc. 8 Jurist, 794—5, June 25 and 28, 1844, it was decided by the House of Lords, after Consultation with the Judges, that an English Vicar Apostolic, as such, was to be deemed *Juris Canonici Peritus*, and a competent credible Witness as to the Canon Law obtaining at Rome and other Countries, which, like England, had received the Decrees of the Council of Trent; although such Vicar Apostolic had not practised in Courts of Canon or Civil Law.

yer (1), "that the Canon Law has no Force in this Kingdom except so far as it has been admitted by the Municipal Law of England, must be understood with certain Qualifications. *Some Things therein are of Divine Right, and therefore require no Sanction from any human Power to render them binding. Such are the Three Holy Orders of Bishops, Priests and Deacons; and the Functions essential to those Orders. Such is the Spiritual Jurisdiction of the Bishops.*

"*Other Things belong to the Discipline and Government of the Church. Such are divers Rights, Ceremonies and Regulations established, by Decrees of Council or Synods, or handed down by Tradition from the First Ages of the Church.*

"The Temporal Law may refuse to sanction and enforce either of these Two Species of Ordinances, whether of Divine or of Ecclesiastical Right. *But it can evidently not deprive them of that Authority which they derive from no Temporal Power. They are abstract Truths propounded by a competent Authority; and they must evidently be true, whether they have the Sanction of Temporal Laws or not. The Temporal Law cannot take away what it did not give. . . . .* The State may indeed take away whatever Privileges she has conferred on the Church. *But the Fact of her having so conferred those Privileges does not afford any Argument to show that the State may take away or interfere with any Thing else.*

"*But what those Things are in which the Church may lawfully give Way to the State it must be for the Church to determine; because the State cannot, without Persecution or Tyranny, decide Matters of Conscience in Opposition to that Authority to whom the Decision of such Matters properly belongs.*

(1) The English Constitution. London, 1841, pp. 17-20, 248-50.



“The Church can lawfully submit to the Authority of the State only so far as is consistent with Her own Constitution; *which must remain the same, whether she is protected or persecuted by the Civil Power.* The Church could not give up any Part of her own Authority, in Consideration of the Protection and Endowments conferred upon Her by the State; because She is not the *Mistress* but the *Trustee and Guardian of that Authority.*

“By recognising the Church, the Temporal Sovereign became Her *Protector, but did not diminish Her Rights.* Otherwise the Church would have suffered a *Diminution of Rights, by ceasing to be persecuted.*

“ . . . . Thus, the State is collateral to the Church. *The Church existed at first separate from and totally unconnected with the State; and was adopted, not created, by the Temporal Power, with all the Spiritual Rights and Privileges appertaining thereto.*

“Whatever belongs to the *intrinsic Authority and Constitution of the Church,* as contradistinguished from those Things which she has received from the State, are *beyond the legitimate Power and Control of the Civil Magistrate.*”

In quitting this Subject, I will take Leave to mention another and a similar Cause of Confusion. I allude to the great Variety of the Definitions commonly attached to the word Law. You have been told by me that the Law is unchangeable; and yet your Experience reminds you of many a Change effected in the Law by Act of Parliament. You have heard that the Law is One; and yet you know that it is of familiar Use to speak of Laws in the Plural Number, and even as differing amongst themselves. I have anticipated in a great Measure, I trust, the Solution of these Difficulties. These, too, are Difficulties of Language only, and have no substantial Existence. It is a Figure of Speech to describe the Specific Application of Law, as though it

were itself a Law, and every Variance in such Application as a Change in the Law itself. "Hence," as Lord Chief Baron Comyn remarks (m), "if it be applied to Criminal Cases it is called the Criminal Law. If to the Affairs of the King, it is called the Prerogative Law. If to Matters within the Forest, it is termed *Lex Forestæ*. If to Trade or Commerce, it is called *Lex Mercatoria*. If to Customs of particular Places, the Name varies according to the Place." Yet in each of these Cases the Law is the same Common Law, One, and unchangeable; and the Distinction is, strictly speaking, a Misnomer.

I have already disclaimed the Intention of usurping upon the Province of others, who are the authorised Interpreters of the Common Law. The Exposition of that important Sphere of Jurisprudence must be reserved wholly to them. It will not form the Subject of this or any future Course of my Lectures.

There remain then for our Consideration the Two Spheres of Temporal Law; (1°), Public or Constitutional Law; and (2°), Private or Municipal Law. In treating of these Subjects, it is usual to follow the Order in which I have named them; and hereafter, when I do treat of them, I shall endeavour to adhere to it. Personal Freedom and Civil Rights undoubtedly repose upon the Institutions of the State as upon their proper Foundations. We must begin from the Foundations our Survey of the entire Edifice.

At present we are not so far advanced. We are not in a Condition to begin our purposed Examination into the present State of the Laws and Constitutions of this Empire. We must know what we have been in past Ages before we can understand our actual Position. The Commonwealth was not made in an Hour; neither doth its Decline date from Yesterday. Its march is one of Centuries,

(m) Digest, Tit. *Ley*. (A.B.)

and we must follow it. We must trace it back towards its venerable Source, in the Bosom of the Gloom of primeval Times, and so long as the Clue of constant and hereditary Tradition shall continue to direct us. We must ascertain what was the Measure of the Birthright delivered down by our Forefathers, before we can be satisfied that we are in the full Enjoyment of that Inheritance, and in the faithful Performance of the Trusts with which it was charged.

It is the excellent Observation of the Count Joseph de Maistre (o), that it was the great Error of the Eighteenth Century, (a Century which professed all Errors imaginable,) to believe that Political Constitutions were capable of being created *à priori*, or out of Paper and Ink; whereas Reason and Experience concur to establish that every Constitution is the Work of God, and that the Fundamental and Essential Laws of a Nation are precisely those which are not and never can be embodied among the Written Laws of that Nation. The Essence of a Fundamental Law is, that it cannot be abrogated, and is beyond the Reach of all. But how can this be true of a Law which is the Work of Man? The Theory of Locke is insupportable. It is not true that the Law is the Will of the whole Community. It would not be true, even if the Unanimity, which the Theory supposes, existed and could be ascertained. The Law is not properly Law,—that is to say, it doth not possess any authentic Sanction,—but in so far as it is the Emanation of a Sovereign Will. In Point of Fact, therefore, the essential Character of Law is, that it is not the Will of All. Hence it was that the sound Sense of Ages, primordial Ages, and as such, anterior to Sophistry, invariably sought the Sanction of their Laws in some Power above human Sovereignty; and they recognised

(o) Essai sur le Principe Générateur des Constitutions Politiques, Sections I. II.

that Sovereignty to have come from God ; and they revered, in certain of their Laws, Traditional, Unwritten, and incapable of being Written, the immediate Revelations of God Himself to Man.

In the Pages of the Work last cited, you will find, amongst other Examples, as the learned Author conceives of the above unquestionable Positions, one very striking Example in the Constitution of England (*p*). That was not made *à priori*. Never was it heard that British Statesmen met together, and proclaimed, "Let us create Three Estates—Lords, Commons, and Convocation : let us adjust the Balances of the Constitution thus, or thus !" No Man ever thought of such a Thing. The English Constitution was the Work of Circumstances, and of infinite Circumstances. The Laws and Customs of the Britons, the Romans, the Saxons, the Danes, and the Normans ; the Canon Law and the Feudal Law ; the Privileges of all Ranks and Conditions of Men ; Wars, Insurrections, Revolutions, and Conquests ; the Crusades ; all the Virtues and all the Sciences ; and lastly, (for these are the reasonable Fruits of the Fall of Man, and are blended more or less with every Constitution extant, or that ever existed), all the Vices, Errors, and Passions of Humanity :—these were the Elements which, working together, and forming in their Entirety and by their Common Action, immeasurable and countless Combinations, produced at last an Union the most complicated, and a Balance of Power the most exquisite, and the best adjusted, that ever were known to the World.

And yet, there was not all this while, amongst all those "Numbers Numberless" of Labourers upon that vast Field, one single Man that knew what he was doing in Relation to the whole, nor that foresaw what was to result

(*p*) Sections xii. xiii. xxii.

from that. The Elements seem to have been precipitated at Random, and without Concert or Direction ;—and certainly there was none from any Human Hand. But, as they fell, they grouped themselves with so much Beauty and Precision, in Combinations so evidently designed in Order to their common Object, that it is a Folly or else a Blasphemy not to see in the Phenomenon the Infallible Guidance of an Arm outstretched above Humanity.

NOTHING GREAT HATH GREAT BEGINNINGS. There is not in the History of all Times one solitary Exception to that Law. "*Crescit occulto velut Arbor Ævo*" is the Everlasting Devise of all great Institutions. Hence it is that every false one is a copious Writer. It feels its Weakness and would seek extrinsic Support. No great and real Institution, therefore, can ever found itself upon Written Laws. The very Men who successively become the Instruments whereby such an Institution is established are ignorant of its Destinies. In the political Order, as in every other, the Imperceptibility of Growth is the true Symptom of Longevity. Take, for Instance, the temporal Supremacy of the Pontiffs. The Time has come, foretold by De Maistre, when S. Gregory VII. and the other Pontiffs, the most odious in that Respect to the Writers of the Three last Centuries, are beginning to be regarded in every Land as the Friends, and Guardians, and Saviours, of the human Race, and as the true Constitutionlists of Europe. Already we are beginning to regard them so.—And I have Faith enough in another Prediction of De Maistre, to believe that none of us will have any other Opinion about those great and good Men, from the Moment that the learned Men of France have become Christian once again, and those of England Catholic ;—Events which, sooner or later, will nevertheless be accomplished. In the meantime the learned Critics of the temporal Power, as claimed and

exercised by these Pontiffs, are expending a prodigious Waste of Erudition to show that, in the Catacombs, the Bishops of Rome were not invested with the political Ascendancy of the Popes of the Middle Age. "Now I tell them," quietly observes De Maistre, "without the least Spirit of Contention, and without meaning to shock anybody, that they exhibit in all this about as much Philosophy and true Learning as if they were to expect to find, in a Babe in Arms, the very Dimensions of a full-grown Man." The Sovereignty of the Popes was born like other Sovereignities, and grew up like them. Pity to see such powerful Intellects, wearing themselves out in the Attempt to prove by Means of Childhood, that Manhood is an Abuse! Surely to suppose any Institution whatsoever Adult at the Period of its Birth, is at the very First View an Absurdity—a very Paradox in Logic.

The Words which Algernon Sydney, the bigoted Partisan of the Social Compact, wrote of the temporal Franchises of antient Commonwealths (and from such a Pen they are the more remarkable) are unquestionably as true of those of S. Peter's See as of every other Sovereign State (*q*). "It were impertinent to ask who made Carthage, Athens, Rome, or Venice, to be free Cities. Their Charters were not from Man; but from God and Nature. When a Number of Phœnicians had found a Port on the Coast of Africa, they might perhaps agree with the Inhabitants for a Parcel of Ground; but they brought their Liberty with them. When a Company of Latins, Sabines, and Tuscans met together upon the Banks of the Tiber, and chose rather to build a City for themselves than to live in such as were adjacent; they carried their Liberty in their own Breasts, and had Hands and Swords to defend it. This was their

(*q*) Discourses on Government, Chap. III., Sect. XXXIII. p. 40, (1st Edit.)

Charter ; and Romulus could confer no more upon them than Dido upon the Carthagenians. When a Multitude of Barbarous Nations infested Italy, and no Protection could be expected from the corrupted and perishing Empire, such as agreed to seek a Place of Refuge in the scattered Islands of the Adriatic Gulph, had no need of any Man's Authority to ratify the Institution of their Government. They who were the Formal Part of the City, and had built the Material, could not but have a Right of governing it."

It is from this the Common Origin of Commonwealths that our Researches into the past History of our own Commonwealth must take their Commencement. All the antient Constitutions hitherto known were Traditional and Unwritten. Usages and Customs were their Elements ;— and they formed themselves out of these. There were Two Methods, and only Two, by which their Development took Place. Either they germinated, as it were, imperceptibly and spontaneously out of a Mass of Circumstances previously existing, and, as we term them, fortuitous : or else the Traditions were collected and compiled into a Code ; and so imposed by the Lawgiver and the Prophet, speaking in the Name of God and with Authority ; and commanding the People to reverence and obey as Laws their familiar Usages of Habit. But in either Case, and by whatever Method, it was the subsisting Tradition, and no new Thing of the Epoch, which became the Law of the Community ; and in both the Prerogatives of God and the Incapacity of Man were fitly and equally established.

"No Constitution," says De Maistre (r), "ever resulted from a Deliberation. The Rights of Peoples are never written, or at least all Acts constitutive, or Written Fundamental Laws, are never more than the declaratory Titles of anterior Rights, of which it is only to be said that they

(r) *Considerations sur la France*, Chap. VI.

exist, because they do exist. God,—not having thought fit to employ supernatural Means for this End,—nevertheless doth circumscribe the human Action ; insomuch that, in the Formation of Constitutions, Circumstances do the Whole, and Men are but as Circumstances. The Rights of the People proper are very often derived from the Concessions of Sovereigns ; as can be proved historically. But the Rights of the Sovereign and Aristocracy—at least their Rights, Essential, Constitutive, and Radical, so to speak—have neither Date nor Author. Even the Concessions of the Sovereign have always been preceded by a State of Things which necessitated them, and which depended not on Himself. In every Constitution there is always that which may not be written, and which must be left in a gloomy and venerable Darkness under Pain of Revolution. The more it is written,—the feebler the Institution. The Reason is clear. Laws are but the Declarations of Rights, and Rights are not declared until they are invaded. So that the Multiplicity of Written Constitutional Laws only proves the Multiplicity of Shocks and the Danger of Destruction. No Nation can give itself Freedom if it be not Free. When it begins to reflect on itself, its Laws are made already. Never did there exist a Free Nation, which had not in its natural Constitution some Germs of Freedom as antient as itself ; and never did a Nation effectually endeavour to develope, by Written Fundamental Laws, other Rights than such as existed in its natural Constitution. No Assembly whatsoever of Men can constitute a Nation ; and even to attempt it would be to exceed in Madness all the Absurdities and Extravagances which the Bedlams of the Universe can produce.”

The English Constitution then is the English Law. The Foundation of that Law is laid in the unwritten and traditional Customs of the Land and its Inhabitants,—Customs



varying amongst themselves as to Period, and Locality, and Place; but in the Aggregate harmonising well together, and constituting the great Body of the Common Law as distinguished from Statute Law. The Common Law thus constituted is imprescriptible; that is to say, no User to the Contrary shall ever afterwards prevail against it. No Custom that has once become Law can ever be lost by any Desuetude (*s*). Modern Practice cannot by any Continuance whatsoever grow into a Custom.

A Statute, as its Name imports, is the solemn Determination of some Point of Law made by a Tribunal; and which Determination being reduced into Writing, and recorded amongst the Acts of the High Court, where it is made, acquires thereby the Force of Law; so as to bind all the inferior Courts of the Country; and the Collection of Statutes is, on that Account, termed the Statute Law. Where the Common Law is silent, or where the Conflict of the Decisions rendered in inferior Courts have made its Interpretation dubious, the Interposition of the Highest Court of the Realm becomes necessary to meet the Difficulty, and the Imperfection of the Common Law is supplied by a Statute, which, from that Time, obtains the Force of Law; insomuch that no subsequent Usage to the Contrary of the Statute can control or affect it, however long-continued that Usage may be. "Albeit the Statutes here," it was said by Three Judges of Edward the Fourth (*t*), "have not been put in Ure, that maketh no Matter. For so there be in the Book of Statutes many Articles which have not ever been put in Ure. But that maketh no Matter. For still they be Law; and may be executed by every Man that is aggrieved to the contrary of them."

(*s*) Littleton, Sect. 170, 1. Inst. 1156.

(*t*) Year Book, P. 4. Edw. IV. 4. (Pl. 4.) *Per Choke*, Illingsworth, and Yelverton (Justices).

A Statute is either in the Form of a new Law, that is to say, making that to be Law which was not Law before; or it is confined to the simple Declaration and Definition of the Antient or Common Law, such as it existed at the Time the Act was passed. In the First Case it is called simply an Enactment; in the Second Case it is called a Declaratory Enactment. Of these Two Classes of Statutes, the latter has always the most Weight; because of its participating so much more largely in the Nature of a Statute,—that is to say, of a Judicial Decree,—than an Enactment doth. Nevertheless both are built upon the same broad Foundation; and over each the great Maxims of the Common Law retain their Supremacy. No Act of Parliament, which derogates from the Fundamental Traditions of the Law, is valid or capable of being enforced. The First Act of Parliament, properly so called, was the Great Charter of Henry III., which was enacted in 1223. The Common Law was much anterior to that!

“The Common Law is so called,” according to the Definition of the Term given by one of our best Writers (*u*), “because it is the Common Municipal Law or Rule of Justice throughout the Kingdom. For, although there are divers particular Laws, some by Custom applied to particular Places, and some to particular Causes, yet that Law which is common to the Generality of all Persons, Things, and Causes,—and hath a Superintendency over those particular Laws that are admitted in Relation to particular Places or Matters,—is the Common Law of England.

“This is usually called *Lex non Scripta*. Not as if all those Laws of which it consisted were only oral, or communicated from the former Ages to the latter merely by Word; for all those Laws have their several Monu-

(*u*) Burn's Ecclesiastical Law, Vol. I., Preface, pp. xxxvi—vii. (8th Edit.)

ments in Writing whereby they are transferred from one Age to another, and without which they would soon lose all kind of Certainty. For, as the Civil and Canon Laws have their Canons, Decrees and Decretal Determinations in Writing, so those Laws of England which are not comprised under the Title of Acts of Parliament are, for the most Part, extant in Records of Pleas, Proceedings and Judgments, in Books of Reports and Judicial Decisions, in Tractates of learned Men's Arguments, on Opinions preserved from Ancient Times, and still extant in Writing. But they are styled Unwritten Laws, because their Authoritative and Original Institutions are not set down in Writing, in that Manner, or with that verbal Explicitness that Acts of Parliament are ; but they are grown into Use, and have acquired their binding Power and the Force of Laws, by a long and immemorial Usage, and by the Strength of Custom and Reception in this Kingdom. The Matter indeed, and the Substance, of those Laws, are in Writing ; but the formal and obliging Force or Power of them grows by long Use and Custom. For Custom, generally received in this Kingdom, obtains the Force of Law ; and is that which gives Power sometimes to the Canon Law and sometimes to the Civil Law, in the respective Courts wherein they are in Use, and again controls both when they cross other Customs that are generally received in the Kingdom."

S. Germain, a learned Catholic Lawyer who flourished under Henry the Seventh, enumerates Five Foundations of the Common Law. 1. The Law of Nature and Reason. 2. The Divine Law. 3. General Customs. 4. General Principles and Maxims. 5. Particular or Local Customs(*x*). According to Lord Coke, the Sources of English Law are Fifteen, and of these Thirteen belong to the Common, Customary, or Unwritten Law ;—One, the Law of

(*x*) Doctor and Student, Dialogue I., Chap. 4.

Parliament, belongs partly to the Common Law and partly to the Statute Law;—and the last remaining One is the Statute Law itself.

“There be divers Laws,” he says (*y*), “within the Realm of England.

“1. As First, *Lex Coronæ* ; the Law of the Crown.

“2. *Lex et consuetudo Parliamenti* ; commonly spoken of in Parliament Rolls. *Ista Lex est ab omnibus quærenda, à multis ignorata, à paucis cognita.*

“3. *Lex Naturæ* ; the Law of Nature.

“4. *Communis Lex Angliæ* ; the Common Law of England, sometimes called *Lex Terræ*. This Law appeareth in our Books and Judicial Records.

“5. Statute Law ;—Laws established by Authority of Parliament. These are of Record in Rolls of Parliament.

“6. *Consuetudines* ; Customs reasonable.

“7. *Jus Belli* ;—the Law of Arms and Chivalry. In Republicè, *maximè conservanda sunt Jura Belli.*

“8. Ecclesiastical or Canon Law ; in Courts in certain Cases.

“9. Civil Law in certain Cases ; not only in Courts Ecclesiastical, but in the Courts of the Constable and Marshall and of the Admiralty, in which Court of the Admiralty is observed *la Ley Olyron*, Anno 5 of Richard the First, so called because it was published in the Isle of Olyron.

“10. *Lex Forestæ* ; Forest Law.

“11. The Law of *Márque* or Reprisal.

“12. *Lex Mercatoria* ; Merchant, &c.

“13. The Laws and Customs of the Isles of Jersey, Guernsey and Man.

“14. The Laws and Privileges of the Stannaries.

“15. The Laws of the East, West, and Middle Marches ; which are now abrogated.”

(*y*) Co. Litt. 11 (*b*).

Hence you will perceive that the History of the Laws and Constitutions of England must be the best History that can be written of England itself, and of every County and City and Borough in England. To know the Laws of your Ancestors, you must know their Customs;—for these were their only Laws; and these are still the more important Part of the Laws by which their Descendants are governed.

The main Groundwork of those Laws, and all their Superstructure, such as they exist at this Day, are undoubtedly Teutonic. The Saxon and the Norman Inhabitants of this Realm came of one Stock, and their Institutions were of Kindred to each other.

The Anglo-Saxon Crown and Constitution passed, in all their Entirety, from the Confessor to the Norman; and the Change of Dynasty and Language was neither accompanied nor succeeded by corresponding Changes in the Government and Laws of England, nor even in the Name of the Country. The Anglo-Saxon Conquest imposed upon the Territories of Great Britain which belonged to the Octarchy the generic Name of England. The Anglo-Norman Conquest was made upon Harold; not upon the English. William was the Cousin and Successor of the Confessor, and the Battle of Hastings placed him in Possession of an independent Crown, and not of a mere Appanage to his Duchy. Under the Anglo-Norman Line England, in Name, as well as in Substance, continued to be that which she had been under the native Prince.

But before we enter upon the History of the Saxon and Norman Periods of the Constitution, it will be necessary for us to devote some Consideration to the early Constitution of Britain as it existed before Hengist. This will form the Subject of my next Lecture.

## LECTURE II.

## BRITISH AND ROMAN PERIOD.

IN this Lecture it is intended to present to you a general Sketch of the Laws and Institutions by which the Inhabitants of this Island were governed before the Landing of Hengist. I do not think that I can introduce these Subjects more fitly than by quoting to you the Judgment which Sir Francis Palgrave, our greatest Historian, has in Words of equal Beauty and Truth recorded.

“This Period,” he says (*a*), “is not to be treated as a Prologue which can be rejected at Pleasure, and detached from the subsequent Scenes. The Seven Hills may again become the Lair of the Wolf, in those last Days when the Desolation of Babylon will afflict the Banks of the Tiber. But, although the Vestiges of the Colosseum and of the Vatican shall crumble away from the Face of the Earth, the Institutions, the Laws, and the Fortunes of Rome will not have ceased to be inseparably interwoven with the Destinies of Mankind. The Empire has been continued, not destroyed; for its Domination did not sink and perish beneath the Yoke of the Invader. Whilst its outward Form was altering, it was replaced by the Communities of Western Christendom; and, instead of considering the States as formed by the Subversion of the Fourth Great Monarchy, they must be viewed as founded upon an Authority, which, severed and divided, was transmitted to the Founders of the Barbarian Dynasties, who succeeded to the

(*a*) Rise and Progress of the English Commonwealth, Vol. I. Chap. X. p. 317.

Inheritance of the Cæsars. It is in the Codes of the Lower Empire, that we discover the Origin of the Principles of Government and Public Law, imparting the European Character—a Character understood so easily, yet defined with so much Difficulty; but which has rendered those Races upon whom it is now impressed diverse from all the other Nations of the World.”

When Cæsar first visited Gaul he found it composed of “Civitates” variously governed; some by Kings, others by Nobles, yet all united together in General Confederations, or Diets, for public Purposes; in their Organisation not unlike those of the Coeval States of Germany, but far more developed in the Practice. The Constitution of the cognate Tribes of Britain was much the same. We find them not unfrequently combined in various Confederacies,—each Confederacy under its own King,—for the common Defence and Government; each Tribe of the Confederacy having nevertheless the exclusive Management of its own internal Affairs. At the same Time it is no doubt true, as suggested by Sir Francis Palgrave, that their frequent Wars and Dissentions, and the Habits of Disunion involved by a Variety of Circumstances, had very much impaired in Britain the Constitution which Cæsar found so vigorous in Gaul.

In their Religion—and with every primitive People their Religion includes their Laws,—they were wholly subject to the Judgment and Guidance of their Druids, a learned College of Pontiffs, and as much esteemed abroad as at home. The chiefest Druids of Gaul came out of Britain. I do not pretend to enter at large into this inviting Subject; and I feel that to avoid the Temptation I must pass it very hastily. I therefore content myself with observing, that the Lore of that Patriarchal Priesthood was derived

from a Time-honoured, and in great part, at least, a Primeval Tradition; that it comprehended the Dogmas of their antient Faith, the Ritual of their antient Worship and Discipline, the Maxims of an admirable Morality, and the Truths of Inductive Science. They were not only the Priests but the Judges of their People. Nor could new Laws be instituted by King or "Gorsedd" without the Proposal or the Approbation of the Druids. War began and ended at their Word. The Loss of Life, or Freedom, or Honour, unless inflicted by the Sanction of divine Authority, was abhorrent to the Feelings of our Ancestors; and, without the Judgment and Sentence of the Druids, no Briton was punished by Bonds or Stripes or Death. Their Lives were simple and innocent. Their Dwellings were in Thickets, or Caves, or hollow Trees; their Food Acorns, Berries, or other Mast; their Drink Water. Hence other Men respected them not only for their greater Knowledge, but for their despising what they themselves valued and treasured. Their Virtue and Temperance gave them great Authority and Veneration among the People, who suffered them patiently to reprove and correct in them the Vices and Crimes from which they themselves were free (b).

The British Communities with which the Invaders came into personal Contact were subjected to Kings or Reguli. The modern County of Kent contained Four such Monarchies, and the Names of their Four Chieftains are recorded by their First Roman Conqueror. We know from the Histories of Boadicea and Cartismandua, that Females were competent to the Exercise of the Royal Functions. Sir Francis Palgrave offers Reasons to show that the Crown was sometimes transmitted in the Female Line, according

(b) Strabo, lib. IV. ; and Introduction to the History of England ; Sir William Temple's Works, Vol. III. p. 74.



to the Order of Succession, which in the Northern Parts of this Island we know to have been established amongst the Picts. The Admission, he says, of Women to the Rights of Sovereignty is one of the few marked Points of Disagreement between the Laws of the Kelts and the unmixed Teutonic Nations. The latter never allowed the Sceptre to fall into the Distaff.

The British Historian Nennius and the Saxon Historian Bede agree in representing the Picts to have come from beyond the Orkneys, where they first settled, into the Northern Parts of Britain; and these were probably the same People with the Cimmerians of Herodotus and the Cimbri of Livy; Keltic Tribes from Asia, who inhabited a Peninsula in the Baltic Sea, called on that Account the Cimbric Chersonese; but which, after their Expulsion from its Shores by the Teutonic Forefathers of the Danes and Swedes, its present Occupants,—received the name of Scandinavia. Driven from the Continent of Europe, the Picts found Shelter in North Britain, and became possessed of the Third Part of the whole Island, “which,” says Nennius, writing in the Year 858, “they hold to the present Day.” The Welsh Triads also preserve the Memory of this Emigration of Keltic Tribes from the North of Europe, and they expressly state them to have come from the very Territory, which, peopled by their Teutonic Conquerors, afterwards poured into the same Island their Jute and Angle Descendants. The Cymri of Britain preserved in their Island-Seats the Traditions of the Continent. The antient Kingdom of Cumbria, after so many other Revolutions, still preserves, as the County of Cumberland, the Memory of their more antient Cimbric Possessions, and Cimmeria their First Home. The Principality of the Heir Apparent is Cambria still; and still its Inhabitants call

themselves the Cymri. They have not accepted those modern Names, Wales and Welsh, Names of English Invention and Use, and under which alone those Mountains and their Mountaineers are known to the English.

On the same venerable Authority of the Triads, we are also informed that, before the Invasion of Britain by the Saxons, an Emigration into the Southern Parts of the Island by Fugitives from Gaul had taken Place. These, whom they call "the Refuge-taking Tribe of the People of Galieddin" (c), are believed to have been the same People whom Cæsar describes under the Name of Belgæ;—who, having at first emigrated into Gaul out of Germany, and afterwards from Gaul into Britain, were a mixed Race, and presented in their Laws and Institutions Traces of a Teutonic as well as Keltic Origin.

The Scots were a Nation of Kelts, who came from Asia along the African Shore into Spain, and thence into Ireland, "which they filled," says Nennius (d), "even to this Day." Afterwards, he says, other Scots came from Spain, and, by little and little, possessed themselves of many Districts in Ireland. A Scottish Colony from Ireland planted itself in Argyllshire, then called Dalriada or Dalretha, where, says Nennius, they dwell to this Day; another in the Isle of Man and the Parts adjacent; a Third in Dyved or Demetia, and in Gower; Districts comprehending the present Counties of Carmarthen, Cardigan and Pembroke; which they continued to hold until about the Fifth Century after Christ, when Kenneth, or Cunedda Wledig, King of North Britain, reduced them beneath his Sceptre (e).

At the Time of the Roman Invasion the Picts in the North, and the Kelts and the Belgæ in the South, were the

(c) Antient Welsh Laws, p. 375. (d) Hist. Britt. sec. 13.

(e) Nennius, sec. 13, 14.

only known Inhabitants of Britain. The Scots appear to have immigrated much later.

What Laws, what Forms of Government subsisted at that Time amongst the Britons, it is impossible to determine in such a Way as to preclude all Controversy or Doubt.

We may safely assume, however, that the Highland System of Clanship, which with such Tenacity still maintains its Existence, does in Fact inherit the main Features of the antient Order of Things, universal throughout Britain, of which it is sometimes employed to embellish the Description. Yet, even with the Aid of the Customs of the Modern Gael, and the corroborative Testimony of the Triads and the Written Laws of Hoel the Good, the Details of the British Polity must be more supplied from Fancy and Conjecture. Undoubtedly the Usages and Maxims of the Days of Old did find their Way into the Metrical Collections of the Historians, and the practical Codes of the Lawgivers who survived the Roman Era. But, by the Aid of any Analytic Process which can now be applied to detect in every Case the Traditionary Portion of the Elements composing the Mass is obviously impossible. Still, that the general Outlines of British Polity remained under Stilicho, who restored the Province to its Native Kings, that which Cæsar found it, there can I think be no Ground for any one, familiar with the Wisdom and Equity of the Roman Colonial Administration, to doubt. The Provinces of the Empire retained, as such, the Institutions they held before their Conquest. They passed under the Sovereignty of Rome with their Magistrates, their Municipalities, and their Laws. The Functions of Government devolved upon the State, whose Subjects they had become; and this Change in their Relations was the inevitable Consequence of Conquest. But the Functions of Administration underwent no

Change on that Account. Equally adapted to the new Order as to the old, Administration went on still in the same Hands,—for the Officers remained the same,—and under the same Sanction,—for the State still subsisted in the Empire. The Sovereignty of the State had been transferred, not extinguished, by the Conquest. The Ambition of Rome was to impose Law, not to destroy it. She added much; she substituted nothing. It was her Habit to set the Foundations of her Polity deep in the Established Order of Things. She did not make Ruins that she might build amongst Rubbish.

But, if the chief among the primeval Usages and Maxims of Cymri Polity and Jurisprudence survived the Roman Era in Britain, still less Reason is there to doubt that, such as they were at the End of the Roman Occupation, they were handed down, in all their Freshness and Vigour, to the Days when Hoel Dha compiled his Code, or the Bards sung their Triads. It is incredible, on the one Hand, that any of the Traditions so valuable and sacred as to have survived, through Centuries of a foreign Dominion enforced by the Sword of Conquest, should have perished within so short a Period,—whether through the Neglect of Guardians so faithful as theirs had shown themselves,—or through the Love of Novelty, amongst a Race proverbially wedded to the Past. On the other Hand, their Wars with the Picts and Scots, in the middle of which they were engaged at the Time of the Withdrawal of the last Roman Garrison,—their incessant Feuds at Home,—and, above all, that internecine Strife which for Centuries they waged against the Saxons, left them neither the Temptation to change their Laws, nor the Leisure to forget them.

We may then, with tolerable Certainty, pronounce the leading Features in the Territorial and Seignorial Jurisdiction of the modern “Welsh Laws” to have been derived to

them from the Laws of the Antient Britons. I proceed to give you some Account of these.

The "Tref," or Hamlet, was to the British Sept what the "Fundus" was to the Roman Commonwealth; the primary Settlement, the political Integer, the undivided Unit of the State (f.) I must draw your particular Attention to this universal Fact. You will meet with it again and again in the Course of your Researches; peculiar to no Constitution; but recurring in all, past and present, in the East and in the West, and alike under Christianity as under the Heathen Law. In our Modern Forms of Speech the Commonwealth or Confederation is the Parent State or Metropolis. In this Instance, as in so many more, we have merely reversed the plain and natural Order of Thought and Speech which belonged to our Forefathers. Their patriotic Sphere of Duty and Affection, while it was large enough to embrace the whole Confederacy, yet tended to one Centre; and for every Man that Centre was the Home which sheltered him, and where his Kindred dwelt.

The general Confederacy into which their State had entered was no Metropolis to them. The "Tref" of the Cymri,—the "Township" of the Saxons—the "Vill" or "Manoir" of the Normans,—the primary Settlement under whatever Appellation,—*that* is in every Community the parent State of its Inhabitants. These are the Units which compose the State, not into which the State is divided. The State is not an integral Whole divided into parts or not so divided, but a Confederacy of Integers; and each of these is one and indivisible. You will hence perceive the Absurdity of that Phrase applied by the French Republicans, and accepted by those, of whatever Opinions in other Respects, who, to gratify centralising and usurping Pre-

(f) Niebuhr's Rom. Gesch. Vol. II. p. 393; Palgrave's Rise and Progress, Vol. i. pp. 67, 93—4, and the Authorities there cited.

dilections, are content to follow the Examples of the Mountain and Gironde. It is untrue to say of the State or Commonwealth that it is *One*. In the Sense intended it is equally untrue to say that it is indivisible. In one Sense it is certainly so, but that is not what the Inventors of the Word would wish to express by it. Compounded of Units which are indivisible, of course the State is both collectively indivisible and indivisible in its Members. But in no Case is it correct to say that the State is *One*.

I must again request your attention to this Distinction of Terms. You will perceive the Importance of it as we proceed.

A "Commot" contained Fifty "Trefs." A "Cantred" or "Hundred,"—the Centena of Germany, mentioned by Tacitus—contained 100 "Trefs." Four Trefs constituted one "Maenawl" or "Stone-Mere-Close," for the Purposes of Judicature. There were thus Twelve "Maenawls" in every "Commot." The two "Trefs," remaining over, belonged to the King; the one for Arable Purposes, the other for Dairy Pasture. Six Maenawls, or one Half of the Remainder of the Commot, were also appropriated to the Crown; Four of these being held by the King's "Taeawgion," or Villainage, in "Gavel;" by the Performance of Prædial Work upon His Manor, and Thirlage at His Mill. They reaped the King's Corn, and mowed His Hay. They kept His Hawks, and fed His Horses and Hounds, and entertained His Followers and Guests. They furnished Supplies to the State. They contributed Beasts of Burthen for the Army. They sent one Hatchet-Man from every Tref to the Camp, to make Barracks for the Soldiery (*g*). The Two remaining "Maenawls" of the Crown were appro-

(*g*) Antient Welsh Laws, pp. 188 to 195; Ll. Wallic, pp. 166 to 175; Mona Antiqua, pp. 125—130.

priated to the Maintenance,—the one of the King's Chancellor, and the other of the King's "Maer;" a Magistrate of gentle Birth and Kindred; for such he was required to be; exercising Municipal Authority over the Villainage of his Lord. The Maer enforced Performance of their Services; and he seems to have been to them in all Respects the Fiscal Officer of their Monarch. He decided their Controversies Civil and Criminal;—from the Suit for Lands to the Demand of the Murder Fine. Part of the Heriots and Fines received for their Lord were his by Right of Office; and, upon the Marriage of a Daughter of the Villainage, the Maer and his Wife were entitled to demand for themselves the "Amobreu" or Mercheta, or, as it is elsewhere called, the "Amabyr" or "Amvabyr,"—that is to say, the Price of Virginity,—which was payable by the Tenant to his Lord. So late as the Reign of Philip and Mary, we find it recorded, how that Henry Earl of Arundell released unto his Men of Clun his Right to that one Incident of British Feudal Tenure (*h*).

The Maer was ever a great Lord amongst those of Keltic Race. In Scotland "Maor" denoted Baron; and the "Seven Earls of Scotland,"—about whom, and the recent Controversy respecting them, Mr. Skene's late admirable Work on the Highland Clans may be profitably consulted,—were originally denominated "Maormors" or Great Lords; before they exchanged that Keltic Title for "Earl," its Synonym in Norse.

The Six remaining "Maenawls" of the Commot were held by the "Mab Uchaelwr," the Freeholders or Gentry. These Maenawls were, on that Account, together with their Trefs, called "Rydd" or "Free," to distinguish them from those of the Bond or Villainage. But although the

(*h*) Ll. Eccles. Gul. Howell Dha. Tomlins' Jac. Law. Dict. tit. *Amabyr*.

Lords of the Free Tenants or Freeholders were exempted from the Service of Purveyance or Supply of Provisions to the Royal Household, the Free-Tenants themselves were liable to the Burthen equally with the Villainage, although permitted to commute it for a Money Payment. Of every "Bond Tref" one Third,—of every "Free Tref" one Fourth,—was the "Rhainder" set apart for the common Pasture of all the Tenants of the Trefs. The Triads also speak of the "Cyvar Gobaith,"—a Portion of Arable Land in every Tref, set apart for the raising of Produce to be laid out in Implements of Husbandry for the common Use of the Tenants (i).

But, concurrently with the Territorial Jurisdiction, there existed the "Kenedyl," the Clan or Tribe; whose patriarchal Rights and Institutions preceded any Thing that could be derived from the Occupation of Land; for those were coeval with the Race (k). Every one of the Clan owed Submission to its Penkenedyl, the Head of its Lineage, and Hereditary Protector of its Rights. The Triads recognise in him One of the Three Royalties of the Cymri. "It was the Duty of every one of the Clan to attend to him, and his Duty to attend to every one of the Clan." When the "Gorsedd" or "Collected Voting," as the Congress of the Country was called, assembled, the Penkenedyl appeared there as the natural Representative of the Kenedyl; and there, and in every other Place of Assembly, for Law, for Battle, or for Worship, in every Act of Power of Dignity or Legislation, that Hereditary Chief was associated to an equal Authority with the elected Representative or "Teisbantyle" of the Kenedyl, nominated by the "Penteuluodd" or Heads of the Families composing it. In this Manner

(i) I. Rise and Progress, &c. pp. 27, 67, 68.

(k) Transactions of the Cymmrodorion, Vol. I. pp. 104—131. Triads, *passim*.



each Clan was ruled. In this Manner the Commonwealth subsisted. The Cymri derived his Title to Property, to National Character, and to Protection of the Law, only by approving his Claim to the Character of Clansman.

The System of Tanistry, which subsisted in all its mischievous Vigour under the Brehon Law of the Irish Kelts, was confined within very narrow Bounds in Britain. In Scotland the Charter of the King was often invoked to confirm the Patriarchal Jurisdiction of the Cean-Cinnith, the Chief of his Clan or Kindred; and, amongst the Cymri of the South, the System of Partition was restrained to Crown Trefs, and only to such of them as were "Tawgdrefs" or Bond. When any Villain died the Tref was divided anew equally amongst the surviving Villainage. But still the youngest Son had the Right, however obscurely it may have been expressed, of succeeding to the Homestead of his dead Father, and the King's Chancellor and Maer made Partition accordingly. The Nobles of the Cymri were altogether exempted from this Law of Tanistry or Parcenery. In the "Tir Gwelyawgg," or Free Land, the Property was fixed and certain, and the Succession definite. There a "Gavelkind" Order of a peculiar kind prevailed. On the Father's Death the Land was partible amongst all his Children; but on the Death of the last Survivor of them, the Grandchildren were entitled to have a new Division of the Father's Inheritance, as were the great Grandchildren on the Death of the last surviving Grandchild; after which this singular Right became extinguished (1). Against the Crown or the Community the Title of the absent Freeholder to the Recovery of his Land was preserved until the Ninth Generation;—against a private Competitor, who had entered into Possession of the Land, until the Fourth Generation from such Entry;—and, even where, in

(1) I. Rise and Progress, &c. p. 74.

the latter Case, the Four Descents had been cast, the evicted Owner was still admitted to one Moiety of his lost Inheritance. The Forms of Pleading and Procedure, enumerated by Hoel the Good, in Real Actions, or Actions brought for the Recovery of Land, are detailed with much minuteness. The Silence of the Law-giver, as to the Use of Deeds or Charters for the Transmission of Title to Land, is on that Account the more remarkable. In every Case mentioned by him the Decision proceeded upon oral Proof of Lineage or of Possession. Here again we behold the Influence which the Traditions of Family or Clan possessed in every primeval Constitution. "The Cambrian Pedigree," says Palgrave (*m*), "was the Record by which those who were of the same Blood and Family asserted their Rights. And the Care with which those Memorials were preserved was not merely the Result of the Honour annexed to Ancestry. They were the Registers of Title, and the Evidence of each Man's Property."

Much interesting Information on these Heads is to be gathered from the Welch Literature.

The Triads of Dyvnwal Moelmud, a British Prince of Cornwall, who, according to Geoffry of Monmouth, was the Father of Brennus the Gaul (*n*), but who unquestionably lived Four Centuries before the Christian Era, have probably undergone much Alteration, in Form at least, since the Time when that celebrated Legislator first compiled them. Still this Code of Law Triads, as they are commonly termed, unquestionably does contain all the Essential Parts of the antient Compilation. There is nothing indeed that should provoke even a Suspicion to the contrary. We know that this was the universal Method of

(*m*) Vol. I. p. 75.

(*n*) See also Milton's History of England, and Sheringham "De Anglorum Gentis Origine;" Cap. VI., Annot. p. 129.

Legislation in antient Times, and that, except in this Country and other Countries now declining towards Corruption, or already corrupted, the same Method obtains still. "And I enquired," says the noble Moslem King and Lawgiver, speaking of that wise and venerable Code, which he compiled for his Mogul Empire, and which in British India is even now Law (o), "And I enquired of learned Men, into the Laws and Regulations of antient Princes, from the Days of Adam to those of the Prophet, and from the Days of the Prophet down to this Time. And I weighed their Institutions and their Acts and their Judgments, one by one. And from their approved Manners and their good Qualities I selected Models, and I enquired into the Causes of the Subversion of their Power, and I shunned those Actions which tend to the Destruction and Overthrow of Regal Authority. And from Cruelty and from Oppression, which are the Destroyers of Posterity, and the Bringers of Famine and of Plague, I found it was good to abstain."

You will therefore reverence the Wisdom of Ages,—antient when the British Lawgiver was young,—in the admirable Passages from his Triads, which I present to your Notice.

"Three Things," they enumerate, "indispensable to a Civil Community:—a Sovereign Head; Union of Suffrage in Legislation; and Judgment by Verdict Collective,—from the Union of common Claim; whether in the Native of the principal or of the adjoining Country.

"Three Things, indispensable to each of the Three former:—Knowledge, arising from common Judgment of the Circumstances; Justice, arising from Conscientiousness; and Brotherly Love between Country,—between a Man and his Countryman,—and between Man and Man. Where these are wanting, it is difficult to guard against great Disunion and Injustice.

(o) Institutes of Timur the Tartar. Eighth Maxim.

“Three Things, that guarantee the Peace of a Fœderal Country; primitive Privileges in Common; a Common Form of Government; and the Cultivation of Science; protected equally in the Fœderal Country, both by Law and Natural Right.

“The Three Ties of Fœderation of a State—Sameness of Language; Sameness of Laws; and Sameness of Rights. Where these are not, the Fœderation cannot be firm.

“Three Things that adorn a Fœderation—laudable Science; kind and steady Conduct; and regular Deportment in Society.

“Three Things that constitute a Country—Kindred; Language; and Rights; and these are called the Ties to a Country.

“The Three Bonds of Society—Communion of Protection; Communion of Tillage; and Communion of Laws. Without these a Social State cannot subsist.

“Three Things, without which there can be no Country—Common Language; Laws; and Soil; for, without these, it cannot support itself in Peace and Union.

“There are Three National Sessions, by Privilege, in the Island of Britain [under the Protection of the Nation of the Cymri]—the Session of the Bards; which is the most antient in Dignity; the Session of Country and Lord; that is to say, a Court of Law, consisting of a General Assembly of Judges and Constitutional Assessors; and the Session of Union and Maintenance; that is to say, a Collective Assembly of the Nation, consisting of Rulers, Chiefs of Clans, and Men of Wisdom from Country and District,—[according to the Ordinances of Civil Community and Laws as affecting a Country in Relation to itself, or in Relation to a Border Country],—by and with the Assent and Consent of Country and Country, Ruler and Ruler, and the Agreement of Privilege and Privilege,—to act, for the Sake of Peace and Jus-

tice. And this shall bind all Parties. No Weapon is to appear drawn in these Sessions, or within their Limits, during their Continuance.

“There are Three National Sessions by Privilege ; to which are subject of Right those who are interested as to Protection, Office, or Dignity, or the Advantages accruing from Trade or Science ; which are in the Cognisance and Jurisdiction of one or other of these Sessions, and the Subjection to them is of Right, and due to the Session whilst in Deliberation ;—viz., 1. The Session of the Bards of the Island of Britain ; which has a Judicial Cognisance of every one who desires to profit by his Talents, in Music, Artificer’s Employment, or Bardism ; and all who attend the Session are under its Protection during the Sitting, until its Office and Business are terminated. 2. The Session of the King or Lord of the District, and his Assessors, Judges and Barons ; that is, every Cymri who is a Proprietary of Land ; thus forming a Court of Justice and of Law. 3. The Session of General Constitutional Assembly ; that is, a General Assembly of Country and its Dependencies, to which the Two preceding are amenable. For, though the Bardic Session be prior in Dignity and the Parent of all Science, yet the Session of General Constitutional Assembly takes Precedence, by Right of Power and Necessity, for the Regulation and Establishment of Justice, Privilege, and Protection,—in the Country, its Dependencies, and annexed and separated Territories in Alliance. And, without this General Constitutional Assembly, the other Two could possess neither Privilege nor Power. For this Session of General Determination of Country and Clan has Three Qualifications ; that is to say, of the Wisdom, the Power, and the Will, of Country, and Dependency,—Clan and United Clan ;—in Order to make, amend, and confirm Law and Union ; and to confirm Equity and Privilege, as to neighbouring

Countries and Territories in Alliance; whether of Borderers or Separate;—whether of Foreigner or Welshman;—by Common Consent, so that in no Part of the Territories can it be withstood. This General Session controls all other Right,—of Determination and of Power,—Law or Authority;—so that none other is equal to it; and it was this General Constitutional Assembly which first conferred the Privileges of the Lord of District and his Territory, and of the Session of Bards. In Fact, it is evident that no Privilege can exist, but by the Respect paid to it [their Court] by Country and Clan.

“Three Things, that are not to be done but by the Joint Will of Country and District, and the Paramount Sovereign Clan. 1. Altering the Law. 2. Deposing the King. 3. Teaching New Doctrines; or introducing new Regulations in the Sessions of the Bards. For these Things ought not to be done, until Country and Clan is informed of their Nature, their Tendency, and regular Order; according to the Judgment of the Learned, who are authorised by Law, and Instructors of approved Wisdom, acknowledged by the General Session of the Bards of Britain, of Country, and District. Where the Purpose or Discussion is in Contravention to this, the Doctrine is termed Vain, and the Profession of it obtains no Privilege or Profit. For neither Law nor Regulation, nor Profession, nor Skill in any Scientific Respect, can acquire Privilege, until it be approved, on Examination, by the Judgment of the Wise and Learned, whose Wisdom, and Knowledge, and Authority, have been privileged by Country and Clan. As to the Deposition of a King, this can only be done by the unanimous Voice of Country and District. In a District, the Oaths of Three Hundred is the Verdict, in every Territory of a Lord, having a Court of his own, subject to the Court of the King in Chief; and the Majority of the District shall con-

firm what is decided by the Votes. The King in Chief is the King, or Prince, Eldest in the Line of Descent of the Kings of the whole Country.

“ Three Ties of Union, that ought to be indissoluble as to Country and Clan. 1. The Tie of Country and Clan ;—that is, a Welshman, wherever he be in any Country or District of Wales, is a Welshman of the same and equal Social Right, in the one District as in any other ; preserving still his particular Right in the Lordship of his Native District. 2. The Tie of Government ; for there ought to be but one King of all Wales, and he the lineal Heir of the Eldest Branch of the Princes of the whole Country ; and his Word superior to the Word of every other Prince—that is to say, in the General Session,—but not in other Cases. For, in all other Cases, the Word of a Prince, or other Lord, having a Court of Justice, is his Word in his own Territory and within its Jurisdiction. And the Eldest by Descent is called King of all Wales, and King of Wales Paramount. By Wales Paramount, is to be understood the whole Assemblage of the Welsh, in all its Territories, and under its Jurisdiction ; each of whom is of equal Right and Privilege, through its Districts ; except as to Possessions, and Rights which are personal and particular, and not natural Rights ; such as those to Land, and Offices in Courts of Justice. Hence the Expression, ‘ Every Part of Wales is free to a Welshman.’ Moreover, it is the Prerogative of the King in Chief to appoint and regulate the Order of the General Constitutional Session,—the Session Paramount, and the taking of the Sense of Wales Paramount. Neither can an Individual or a Country, separately, do that which belongs to Sceptre and Sceptre Paramount. 3. The Tie of the same Common Law, and Right, and Verdict. For the Law, Right, and Verdict, ought to be uniformly the same to every Native Welshman, in every Part of Wales, without Dis-

inction ; because every Part of Wales, without Distinction, is the Country of a Welshman ; except as to particular private Concerns, not dependent upon his being a Native of the Country. Hence the Expression,—the Country of Wales Paramount,—the Race of Welsh Paramount,—and the Rights of Wales Paramount.”

Such, then, were the main Characters of the early British Confederacy. Its Villages were States. Its Clans were Nations. The Hereditary Succession of each one gave Stability and Permanence to all. The Rights of the Constituent States were adjusted by their Elective and Hereditary Representatives ; the “Gorsedd,” or Diet, of the entire Federation. At the Head of that Federation stood the Monarch,—independent in Person as in Revenue,—and invested with Powers, whose Extent, no longer known to the Historian, yet were well ascertained at the Period of their Existence, and were regulated in the Exercise by the International Usage of the Confederated Clans ;—the Cæsar of their Empire—their Chief Amphictyon in Council,—their Judge in Controversy,—their War-King in Combat.

The Conquests of the Romans were achieved with the greatest Difficulty, and at the Point of the Sword. The First Vengeance of the Victors fell heavily, therefore, upon the Vanquished : and the Confiscations of Camalodunum and other entire States which followed, served as well to awe the Provincial as to reward the Legionary. Into those States which were converted into Colonies, the Troops marched in with their Standards at their Head, and their Ranks unbroken ; and, in the Language of Palgrave, the Soldiers of the Legion became the Inhabitants of the City. The Reguli lost their Domains. The Freeholders were stripped of their Possessions. But the Villainage remained still upon the Soil, as the Coloni of that Roman Veteran, who had seized upon the Possessions of their Lords. The



Author of "The Rise and Progress of the English Commonwealth" was unable to meet with any Traces of such Spoliations after the Reign of Claudius; but at no Time were they very generally practised. In the Grant of Roman Freedom made by Caracalla to all the Provincials of the Empire, the Britons participated; and, from that Time, the long Silence of their History attests the Repose of their State.

The National Character was Romanised, but not obliterated, by the Conquest. Their Religion subsisted, and its Rites; and we may even suppose, with the profound Writer last cited, that the Druidical Priesthood was not only upheld in Name, but flourished as a Hierarchy. With the First Fury of each successive War, the Hostility of the Conqueror to the British Aristocracy subsided. With diminished Rank and subordinate Authority, the Kings still reigned, and the Nobles continued to administer. Cogidunus was confirmed in the Royal Power by Claudius, and even obtained from that Emperor an Increase of his Territory. King Lucius, or Coill,—famous for his Transactions with S. Eleutherius, the Roman Pontiff,—is said to have been descended from the Royal Line of the Regni. With Reason does Sir Francis Palgrave linger over these Instances of the Old Roman Respect, for every Thing that deserved to be respected.

"The Existence," he says (*p*), "of the Royal Title in the Provinces of the Empire, was one of the proudest Trophies of Roman Supremacy. In Africa, the Kings of Mauritanian Race acquired only an inchoate Right by Descent; they were raised to the Throne by the Emperor, from whom they received their Regalia; and it is a singular Circumstance that, even when these Potentates were engaged in war with the Empire, this Investiture was requested

and obtained from the Chiefs of the hostile Commonwealth. Such indeed had long been the Public Law of the Empire. The Vassals, who were allowed to retain the Royal Title, accepted their Inheritance as a Gift, and were well contented to hold their Dominions by the Permission or Indulgence of their Masters. And, limited and restrained, the British Allies and Tributaries subsisted in various Districts; intermingled with the Territories, in which the Inhabitants were subjected to the Empire, without any intermediate Authority."

In the Reign of Constantine the Great, which is the Period at which the History of Modern Europe properly begins, the Administration of the Roman Provinces was confided to Four Prefects; One of whom, as the "Prefect of the Gauls," extended his Jurisdiction,—from Treves, where his Court was,—to the Highlands of Scotland in the North, and the Moorish Deserts of Tingitania in the South. Each Prefecture was divided, into Diocesses governed by Vicars; and each Diocess was subdivided, into Provinces governed by Consulars or Presidents. But these local Governors began to be otherwise distinguished. The Comital Dignity,—originally belonging of mere Courtesy to the confidential Friends and Companions, "Comites," of the early Cæsars,—gradually became the Rank of Privy Councillor, and obtained, as such, a recognised and established Precedence in the Empire. Under Constantine, the Grades of the Dignity were constituted; and, thenceforth, it was always conferred by special Diploma or Patent, and, generally, upon Prefects and their Delegates, in order to increase their State and Consequence in Office. Hence the local Governors began to be generally styled the Counts of their respective Jurisdictions.

The Diocess of Britain contained Five Provinces; and, to these, on the dubious Authority of Richard of Cirencester, perhaps a Sixth is to be added. Within each Province

there were Roman Settlements; and these were divided into the *Coloniæ*, the *Municipia*, and the *Civitates*. It will be unnecessary for me, on the present Occasion, to occupy you with these subordinate Distinctions. Long before the Departure of the Romans from Britain, these had become wholly obliterated in Practice. The Specific Difference of Class had merged in the Generic Character of *Civitas*.

The *Civitates* of Roman Gaul were formed out of the Antient Gaulish States, or were at least conterminous with such. Whether the same Manner of political Division prevailed in Roman Britain, the Paucity of Notices, respecting that Diocess, to be found in the Imperial Legislation, does not enable us to determine;—but it is highly probable. It existed in many other of the conquered Provinces besides Gaul.

“Subjugated by the Generals of the Republic,” Sir Francis Palgrave remarks (q), “the Federative Governments of the Hellenic Nations were respected or restored by the Cæsars. Their Political [Sovereign] Power was certainly lost. Neither Peace nor War could be offered or declared by them. Their Attributes of Sovereignty had disappeared. Yet they did not exist merely in Name. Lycia and Lycaonia, electing their Governors and Commanders, were perhaps more free than Rome, who accepted Her Consuls from the Nomination of the Emperor. The Galatian Confederacy subsisted, though incorporated in the Empire. Cæsar presided in the Conventions of Gaul; and Augustus summoned the Assembly at Narbonne, in which Regulations were enacted for the Purpose of restoring good Order in the Country, so long desolated by War. These Senates replaced the older National Councils; performing such Functions as could be retained by a dependent Legis-

(q) I. Rise and Progress, p. 346.

lature. They held the same Situation in the State." . . . "It was a generous, and therefore a wise, Maxim of the Romans, to allow their Subjects to retain their National Laws and Customs, as far as was consistent with their subordinate Station; and, unless when Resistance or Rebellion drew down Punishment, it does not appear that the original Consitutions were obliterated or destroyed, whatever Modifications they may have received or adopted from the Ruling Power."

But the solitary Rescript concerning Britain, contained in the Code of Theodosius (*r*), informs us, that every British Civitas was governed by its own Senate of "Curiales," or "Decuriones," under their "Principalis," or "Comes," and having their various Grades of "Primates," after the Manner of every "Civitas" throughout the Empire. Those were Functions which belonged to peculiar Families. They resulted, as the Law emphatically declared, from Race, Blood, and Birth; or, if these failed, from Property; and those who were entitled to possess were always bound to perform. The Prerogative of Purveyance, which empowered the Emperor and his Followers to claim Residence and Provision when they came to the City (*s*), was enforced through the local Authorities. They provided for the Collection of the Taxes, to which their Civitas was assessed in the Books of the Imperial Prefect. It was their Duty to approach the Throne by Petition,—of Right,—or of Grace and Favour,—according to the Wants of their Citizens, and the Circumstances of the Case. The Imperial Prerogative of Legislation was rarely exercised in the Civitas, but upon the Prayer of the Senate;—their unanimous Prayer—for, as in the Gorsedd of the Cymri, and the Witenagemot of the Saxons, and the Parliament of the Plantagenets,—so, in the

(*r*) Lib. II. Tit. 7. s. 2. (*s*) Cod. Theod. VIII. 8.; Cod. Just. XII. 41.

Assemblies of Rome and Greece, Legislation was esteemed to be—that which it unquestionably is—a Judicial Function; and the Unanimity of the Jury was alike indispensable to the Presentment as to the Ordinance. Nor was that the only Impediment upon Legislation. The “*Lex Prætoria*” entitled the Citizen, aggrieved by the unjust *Consultum* of the Senate, to a Decree of the Prætor in his Favour, pronouncing the Nullity of the Act. Upon this Subject I shall have more to say hereafter, when I come to show you that the same equitable Law exists in England still; and that no Act of the Parliament itself can ever become a Law, which plainly and inevitably import Injustice. The Senates of the Civitates sent their Delegates to Rome, to represent the Interests, and to plead the Causes, of their respective Communities there before the Emperor in Person. They also possessed the Power of Impeachment; and they used it. Great Honours and Privileges, and withal great and laborious Duties, were attached to the Seat in the Senate of “*Decurions*” (†).

Moreover, in each City there were the “*Collegia Fabrorum*,” or Guilds of Artificers;—Municipal Bodies, whose Parent-Institutes at Rome boasted an Immemorial Prescription, but which, in the Diocess of Britain, could have derived their legal Existence only from the “*Senatus Consultum*,” or the Rescript of the Emperor as Evidencing the Authority of the State. They possessed their own Religious Rites and Mysteries, and their own Laws of Government. They were linked to their respective Cities by the Obligation to reside, and to their respective Avocations by Caste. Apprentices might be received; but the Employment descended to the Children of such, precisely in the same Way as to those of the Hereditary Members. The Colleges

(†) Cod. Theod. Lib. XII. Tit. 1, de Decurionibus,

which followed Mixed Employments requiring Occupation of the Soil, added, to the Obligation of Caste and Residence, that of Prædial Servitude or Villainage;—as in the Case of the “Pistores,” who were Millers as well as Bakers; and the “Navicularii,” or Lightermen; whose singular Position in respect to Tenure Sir Francis Palgrave has very happily illustrated, by Reference to the Tenure of Land in certain Hindù Villages on the One Hand,—and, on the other Hand, to that of the Company of “Free Fishermen and Dredgers of the Manor and Hundred of Faversham,” and other such Corporations still existing, and deriving Title by Prescription from the Villains Regardant of Anglo-Saxon Lordships (*u*). From the Nature of their Occupation, the “Ligniferi” or Woodmen whose Votive Inscription still exists, on the Altars of Middleby (*x*), were probably also of this Mixed Class.

The Guilds enjoyed considerable Privileges within the Jurisdictions, of their respective Civitates. Gaius says, of them in general, and of the Baker's Guild in particular, that they were Minor Republics. They might, if they pleased, secure the Protection of a “Defensor” or Patron. But they possessed, in their perpetual “Actor” or “Syndic,” a Standing Representative; who, without Special Warrant, asserted their Rights in all Judicial Proceedings, and on all public Occasions whatsoever. They met apart from the Municipal Senate or Curia; and they appear to have stood in the same Relations with the latter towards the Imperial Authority. The ruined Temple of Pallas and Neptune at Chichester (*y*), which attests the authority retained by the Royal Cogidunus under the Supremacy of the Cæsars, commemorates also the Importance and honourable Zeal of a certain “Collegium Fabrorum” there, who—under the

(*u*) I. Rise and Progress, pp. 333—4. (*x*) Brit. Rom. p. 342.

(*y*) Brit. Rom. p. 337.

direct Sanction of the Regulus himself, had founded and dedicated that sacred Edifice.

London, and Verulam,—the modern St. Albans,—are mentioned, amongst the more considerable of the Latin Cities of Britain, “enjoying their own Laws and their own Rights,” and conferring on their Citizens the Privileges of Rome itself. These Cities have survived to the present Time; and the Importance of both, and of London especially, has been ever on the Increase, under each Change of Dynasty and even of Race. But other Civitates, not inferior in Consideration to these, flourished in the Roman Time, which have long since ceased to exist or ceased to flourish. Our Boroughs in like Manner were of Roman Institution. The Term *Πύργος*, a Tower, was unquestionably received through the Romans. Borough Castle, in Norfolk, the antient Fortress of Garianonum, was built by the Romans for the Protection of the Coast. Sir Francis Palgrave has observed of this compound Designation, Burgh Castle, that it was also adopted in the East; and he mentions one instance of its having been so adopted (*z*). Many other Places still exist which are called Boroughs, but which, for several Centuries, have not had the least Trace of Borough Privileges. The Laws of the Confessor, as Mr. Sergeant Merewether very justly remarks, so far from treating the Boroughs therein mentioned as Novelties of later Growth, recognise them as having been established so long, that they had then grown to be a Part of the Political Institutions of the Country (*a*).

The leading Feature in all the Institutions of the Roman Municipal Law was the Strictness with which they defined, to every Citizen, his proper Place of Abode, and com-

(*z*) *Πυργοκαστελλον*, *Proc. de Edificiis*, Lib. II. c. 8.

(*a*) *History of Boroughs and Municipal Corporations*, Vol. I. p. 9.

pelled him to reside there. The Freeman, born in a City or Borough, was expected at the Age of Twenty-One to return to it. Whether by Birth, or by some other decisive Act under the Law, every Person had his "Domicile," and his Forum, where alone he could sue for the Redress of Injuries. If he travelled it was by the Public Road; and he was forbidden to stray Fifty Paces to the Right or Left of that. He was always expected to be there, in his Person, where he was domiciliated by the Law (b).

In these Provisions against Vagrancy it is impossible not to see the Originals of the antient Laws, of the Anglo-Saxon and Anglo-Norman Time, against the same Mischief. I need not remind you of the present Law of Parochial Settlement, which is embodied in our Poor Law Code, and is addressed to the same End;—every Case of Relief that arises under that Code being in Fact to be resolved by the Question,—whether the Pauper belongs, as a fixed Inhabitant, to the Place where he happens to be, or to some other and what Domicil.

Each City, possessing the exclusive Functions of local Administration, and independent within itself, was yet, for provincial Purposes, united to the Province. Its proper Description was, "*Civitas libera et foederata* (c). This Confederation of the *Civitates* was knit powerfully together, by the Habit of holding Provincial Councils, which assembled for the Redress of their common Grievances, and the Performance of their common Obligations. Their Ordinary Sessions were held at a fixed Time and Place, and without special Mandate. Extraordinary Meetings however might always be convened by the Count of the District, under his Rescript or Writ. The entire Diocess had their Federal

(b) Cod. Theod. vii. 5, xi. 7, xiv. 9; Cod. Just. x. 42.

(c) Plin. Epist. x. 93.



Curia or Senate, as each of the Provinces of the Diocess had theirs ; and the Curia of the Civitas was the Groundwork and Model, upon which those of the Confederation were constituted.

The "Seven Provinces" of Gaul,—as we know from the Edict of Honorius, by which, after an Interruption occasioned by the calamitous Invasions of the Barbarians, they were revived, and regulated,—formed the Federal Council of Arles. The Details given by the Edict are of the more Importance, because there is every Reason for Sir Francis Palgrave's Conjecture (*d*) that the Councils of the British and Spanish Diocesses of the same Prefecture were similarly constituted to that of the "Seven Provinces," when it was revived by Honorius. The Bishops took their Seats as the Fathers of the Church. The "Counts" of the Provinces, and the "Judices," and "Honorati," or "Curiales," of the Cities, attended by Virtue of Office,—or were allowed, in the Case of the more distant Provinces of the Novempopulania and Aquitania Secunda,—comprising the modern Gascony and Poitou,—to send their Deputies. Lastly came certain of the "Possessores" or Landholders,—qualified, by Property, and perhaps by some Method of Election, of which all Trace is now lost, to represent more particularly in the Federal Council the "Ordo," or Estate of Citizens to which they belonged. These formed the Senate of the Seven Provinces, which afterwards became a Gothic Kingdom, under the Name of Septimania,—a Name derived from their original One by an easy Corruption of Dialect,—with a Territory almost coextensive with the modern Languedoc (*e*). The Senate so constituted, as Sir Francis Palgrave remarks, emulated all the Privileges of the Conscript Fathers of the Capitol. In the Year 455,

(*d*) I. Rise and Progress, p. 337.

(*e*) Marc. Hisp. p. 91 ; I. Rise and Progress, 338, n.

they conferred the Imperial Dignity upon Avitus, whom the Legions at Toulouse had saluted "Semper Augustus." It was by the Honorati of Arles that he was invested with the Imperial Purple. Rome and Italy submitted to the Emperor of Gaul (f).

The Triumph of the Goths, which separated Gaul from the Empire, and erected the Throne of Septimania upon the restored Independence of the Seven Provinces, did not suppress their Senate. Under Alaric II., who won that Throne from the Romans, the accustomed Session of the Assembly was removed from Arles to Toulouse; and there the Bishops and "Electi" (or Secular Deputies) of his new Kingdom discussed, examined, and adopted, that Digest of the Roman Law, commonly called the Anian Breviary, which was propounded to them by his Chancellor Goaric, to become the revised Plan of Jurisprudence for the future Government of his Subjects of the Roman Race, and to be observed as such in the various Cities and Tribunals of Septimania. For those Gothic Conquerors, like the Romans themselves of Old, were Men of Magnanimity and Wisdom, and governed every Class of Subjects according to their own antient Laws. In the Assembly of Toulouse Alaric knew and revered the Senate which, at Arles, had administered the Affairs of the Seven Provinces under the former Dynasty, and was therefore the lawful Representative of the People over whom he was called to rule (g).

It would be difficult to suppose, in the Citizens, a lesser Respect for their own Municipal Privileges, than was entertained by the Barbarian and the Conqueror. If the Seven Provinces of Gaul retained their Senate under the Goth,

(f) Sidon. Apoll. in Paneg. Aviti; Dubos, Vol. II. ch. 20.

(g) Commonit. Alar. ad. Cod. Theod. Gothofr. Prol. c. 7; Hist. de Languedoc, Vol. I. p. 241.

it is only natural to conclude, that the Civitates of the British Diocess were not abandoned to Anarchy by the Withdrawal of the Roman Legions and the Restoration of the British Independence. It is reasonable to conjecture that the Anglo-Saxon Invaders found them subsisting in all their Vigour wherever they set their Foot ; and that,—as the Tref became the Town, and the Cantred the Hundred, and the King and His Witan replaced the Regulus and His Gorsedd,—so, in the Cities and Boroughs of the Saxon Time, the essential Rights, and Privileges, of the Civitates and Burgi of their respective Localities, were fully preserved and established. In this Instance, indeed, as in so many others, Tradition and Experience are found to be in full Concurrence with Reason. The Written Laws of the Anglo-Saxons recognise, in those little Commonwealths, an Existence older than the Compilation of those Laws themselves, and at least coeval with the Octarchy. The Language of the Chronicles expressly affirm their Roman Origin. Their own By-Laws retain the Stamp of that Origin ; and the Coincidence of so many of their prescriptive Rights and Usages with the very Letter of the Roman Code, is too minute to have been in all Cases accidental, and far too antient to have been the mere Result of modern Enactment. From Time out of Mind, to use the Language of Lord Holt's celebrated Definition (*h*), those Portions of the Civil Law, which were not otherwise than according to the Common Law of England, have been received and allowed in England, and are thereby become obligatory in England, and incorporated into the Common Law itself. Of the "Fifteen Laws" of the Realm of England, enumerated by Lord Coke (*i*) as being in his Time concurrently in Force, the Ninth is, "The Civil Law in certain Cases." Of the

(*h*) *Phillips v. Bury*, 1 Ld. Raym. 7 ; 2 T. R. 355.

(*i*) Co. Litt. 11, *b*.

others, no less than Five are either derived from the Civil Law, or to be interpreted according to it. These are "Lex Naturæ;"—which, in the Sense of our older Authorities, always included the Law of Nations (*k*);—"Jus Belli;" "Ecclesiastical or Canon Law;" "The Law of Marque or Reprisal;" and "Lex Mercatoria or Law Merchant."

In the Time of the Romans,—it is said by the profound Selden (*l*),—namely, from the Year of Christ 50, until towards the Year 410, a Period of about 360 Years, the Civil or Imperial Law was in Use in Britain; and, afterwards, it hath been used,—for Direction, where the Law of England is silent,—or for Confirmation, where it is consonant. For Custom, as the learned Compiler of the Ecclesiastical Law remarks (*m*), generally received in this Kingdom, obtains the Force of Law, and is that which gives Power sometimes to the Canon Law, and sometimes to the Civil Law, and again controls both, when they cross other Customs that are generally received in the Kingdom.

It is one of the Attributes of Wisdom always to recognise its Counterpart. The Roman Law came into Contact with the Laws of the First Inhabitations of this Island, and it respected what it touched. Other Traditions of the Wisdom of Ages were subsequently introduced by the foreign Invaders, who came after the Roman Domination was no more. But the Laws of the Saxons, the Danes, and the Normans, did not abrogate the Imperial Code, any more than that Code had abrogated the Triad. The Wisdom which was in the Institutions of Germany easily assimilated itself to both. The Teutonic Tribes blended with the Conquered, both of Roman and of British Race, and became a numerous and opulent People, without losing their hereditary Virtue.

(*k*) P. 13 Edv. IV. 9, Pl. 15; 2 Roll. R. 113-14.

(*l*) Diss. ad. Fl. 464, 472, 479, 480; Com. Dig. *Canons*. (A).

(*m*) Burn's Eccl. L. Pref. p. xxxvii. (8th Edn.)

It is the sound and judicious Observation of Sir Francis Palgrave (n): "Unquestionably the Laws and Customs retained by the Teutons greatly assisted in the Formation of the Parliaments, Cortes and Legislative Assemblies of Modern Europe. But they were by no Means the sole Elements ; and, without pretending to determine the exact Extent of the Influence of Roman Policy, we may be convinced, that we must emerge from the Forests of Germany in seeking the Origin of the English Constitution."

But it is from the Settlement of the Anglo-Saxon Octarchy upon the Shores of Britain, that the Era of the English Constitution, properly so called, must be dated.

Then the Roman Colonies, and the Nations of the Kelts, passed under the Dominion and Language of the Sea-Kings of the North ; and nearly all the Federal States and Cities and Boroughs of Britain, with no very great Change in the territorial Landmarks, and almost none at all in the substantial Character of their antient Jurisdictions, constituted,—under the generic Appellation of "England," imposed by Conquest,—the Eight confederated Kingdoms of the Angle, Jute, and Saxon Tribes. The Hands which stripped the British Regulus of His Principality, did not spare the Possessions of His Nobles and Free Tenants. Numbers of the antient Chiefs perished in the terrible Conflicts, which they were reduced to wage with their Invaders, not only for Dominion, but for Life. Proscriptions and Massacres,—invariable Attendants of every Defeat,—swelled the fearful Tale. Many fled to Armorica,—others into the Kingdoms of the Cymri, the Scots and the Picts. But those who thus survived the Conquest of their Country, did not escape the Confiscation

(n) I. Rise and Progress, p. 366.

of their Possessions, and the Loss of their Privileges. The antient Villainage remained upon the Soil, as the Ceorls of the new Order. To these, doubtless, there were added great Numbers of the Free Tenants, and perhaps of the Nobles, whom the Fate of War, or their own Election, had reduced from their proper Estate to that of their Dependents.

Henceforward we lose sight of the "Gorsedd," and the "Chenedyl," the "Tref" and the "Cantred." But it is the Name, and not the Substance, of those old Institutions, which disappears. The "Witenagemot" replaced the "Gorsedd;" as the "Maegth" and the "Borh" succeeded to the "Chenedyl. And the "Gerefa" (or Reeve) of the Lord of the "Upland Vill," by whom the Lord's Affairs, and the Rights of the whole Villainage, were managed and represented—in their own Court, and in the Court of the "Hundred,"—we cannot mistake the true and lawful Successor to the "Maer" of the antient "Tref;" any more than we can fail to discover the former Institutions of the "Cantred" and the "Tref" under their Anglo-Saxon Names of "Hundred," and "Vill," or "Township," by which they are still known to us.

I must not be misunderstood to say, that the whole Institutions of the conquered People did not receive very important Modifications. On the contrary, very little beyond the broad Foundations of their Polity survived the Dominion of their Race. Upon those Foundations the Anglo-Saxons built the Laws of England; and it is that Superstructure, and those Foundations, which have subsisted to this Day. That which is Characteristic, therefore, in our existing Laws,—that which strikes the Attention, and commands the Respect of every Observer,—is almost entirely of German Origin and Anglo-Saxon Introduction; but Ro-

man Skill prepared the Field, and the Stock was of British Growth. The precise Degree of Influence, which the Learning of Rome and the Customs of Britain had, in moulding the English Commonwealth, it is foreign to my present Purpose, if, indeed, it were possible, to define. But, that what they did possess in that great Work, was disposed and regulated according to the Standard of Anglo-Saxon Traditions and Usages, and that theirs were sunk and lost by their Incorporation into these, there cannot be any Doubt. The Jurists, and Legionaries of Antient Rome, and the Tribes and Provincials of Antient Britain, did unquestionably contribute much towards that great Code of English Laws and Customs;—which, after governing the General Empire, or Confederacy of States, under various specific Designations, received at last from Saint Edward the Confessor, when he compiled them, their generic Name of “Common Law,” which they continue to possess (o). But, in none of the States of which England was composed, do we meet with any of the British, or of the Roman, Laws, recognised as such, or existing under distinct Designations. The Conquerors made those Laws their own by Adoption (p), and not otherwise, and incorporated them amongst the received Traditions of their Race; and as such, and in no other Character, they retained, under the new Order, the Authority of their own inherent Virtue, and the Supremacy which they had held and exercised of Old. In like Manner, when Ina, Alfred, and Edward, and other Saxon Lawgivers, embodied in their Codes of the Common Law, by which their Estates were governed, the Traditions of Dyvnwal Moelmud, or the Tables of the De-

(o) I. Reeve's *Hist. of English Law*, pp. 2, 3.

(p) As those of Dyvnwal Moelmud and other British Kings expressly were. (Sheringham, “*de Anglorum Gentis Origine*,” Cap. VI. Annot. pp. 125—6.)

cemvirs, they did so, not in those Names, nor by that Authority, but in the Name and by the Authority of Saxon Usage and Habit. Thus, and not otherwise, were they received amongst the Laws of the Empire,—at one Period as Laws of the several States composing the Octarchy,—at a later Period, as those of Wessex, Mercia, and the Dane-laghe;—and, at a still later Period, as Laws “common to the whole Realm” (*q*), or “the good Laws of Saint Edward.” Apart from these, they had no Worth, no Existence. They subsisted only by Custom, and that Custom English.

(*q*) Com. Dig. Tit. *Ley*; A. B.



## LECTURE III.

## ANGLO-SAXON PERIOD.

WE approach the Era of Charters. From the Anglo-Saxon Period, we shall observe the growing Use and Importance of those venerable Records, the Evidences of Laws more venerable still. But we must not, out of an excessive Regard for these, lose Sight of their proper Value. They were, not the Law, but the Testimony. Our Forefathers revered them highly,—too highly to make them the Objects of a superstitious Worship.

In later Times, indeed, most of those primordial Rights, Institutions, and Customs, which constitute the Common or Unwritten Law of England, have been considered as if derived, rather from the Recognition at various Times awarded to them by Sovereigns and Ministers, than from their true Source,—Immemorial Prescription. It has become our Habit to speak of the Charter, or solemn Act, which acknowledged the Right, as though that had bestowed it. Thus, according to Lord Coke (a), “every Franchise, Liberty, or Privilege, either lies in Point of Charter, and cannot be claimed by Prescription, or in Prescription and Usage, without the Help of any Charter.” And, however claimed, “all Franchises,” according to Sir John Comyn (b), “are derived from the King.” Whether they are claimed by Charter or by Prescription, their Source is always Royal. Prescription in itself “supposes the Grant of the King” (c). From Him all Privileges are derived, whether of the Forest, of the Fair, of the Market,

(a) 9 Rep. p. 27 (b). (b) Dig. Tit. *Prerogative*, (D. 30).

(c) 2 Inst. pp. 281, 496.

of Casual Profits, or of Trade. He, by his Prerogative, is the Fountain of all Dignity and Honour in His Realm (*d*). Lastly, He is the Head of the Law itself. "And therefore," adds Lord Coke with a deep and pregnant Meaning, "præsumitur Rex habere omnia Jura in Scrinio Pectoris Sui!" (*e*)

These were but highflown Words, if intended of the Sovereign in a merely legislative or ministerial Capacity. But, in the Sense of those who transmitted them to our Times, they are no more than adequate to the Thoughts which they were intended to express. They carry us back to Days when the Sovereign was Judge, and His Enactments were Decrees. The Charter, that solemn Recognition of established Right, could not be granted, but on clear and irrefragable Evidence of the Right. Magna Carta itself was not granted but after Inquisition and Return. The Right, though not conferred by the Charter, was acknowledged and sanctioned by it; and thus the Charter became, for ever afterwards, the best and safest Record of the Times which had preceded it. To declare the History of bygone Ages for the purpose of giving Law to all Time coming, was thus the august and sacred Function of the Sovereign as Judge. We need not wonder that the Organ which uttered the Oracle should have itself received the Name and the Celebrity of the Power which inspired it. The Law was given without His Help, and before His Time. Yet, in declaring and enforcing it against its Breakers, He did, in some secondary Sort, become Lawgiver to them, for whose Behoof He acted. In this Way, it might be well "presumed" of Him that "all the Laws of England," which it was His sworn Duty to administer, "were locked up within the Treasure House" of His rich and royal Heart!

(*d*) Dig. Tit. *Prerogative* (D. 31, 32,) Tit. *Dignity* (A.)

(*e*) Co. Litt. 99 a.

This is the only Sense in which those great Constitutional Authorities are to be understood. For, as we have seen, the Common Law of England had other Foundations than in the mere Will, or Caprice of Princes. The Variations and Anomalies of that Law were occasioned, not by the Predilections or Antipathies of the Monarch, but by the Conflict of the Elements, which happily concurred to form it. Above all Occasions of Conflict, the Locality of the various Customs was perhaps the most important. But under the Octarchy, it produced, with the Church's Help, an International Law, which both Comity and Justice concurred in maintaining. When Octarchy verged into Monarchy, yet did this International Law continue. It became the surest Barrier against the too great spread of central Administration; the best Safeguard of the special Franchises of Districts. It became the Common Law!

Unwritten at their Commencement, and in many Instances remaining Unwritten to the End, we cannot expect to find positive Proofs of the Dates at which the Customs began. It is enough to know that they existed. If we find them at any Time, in full and general Operation, influencing the Actions and controlling the Events in which they took Part, we may be sure that they had already obtained the Force of Law; in the Absence of Parchments recording the Fact.

Thus, there can be no Doubt, as a great Jurist (f) has well remarked, that, in the Anglo-Saxon Times, the Rules of Inheritance were well established and defined. "Yet," he says, "we have not a single Law, and hardly a single Document, from which the Course of the Descent of Land can be inferred. Being Regulations adapted to existing Institutions, the Anglo-Saxon Statutes are concise

(f) Sir F. Palgrave's *Rise and Progress of the English Commonwealth*, &c. Vol. I. p. 58.

and technical,—*Alluding to the Law*, which was then living and in Vigour, rather than *Defining it* ! Consequently the Appearance of a Law, seemingly for the First Time, is by no Means to be considered as a Proof, that the Matter which it contains is new. No Period or Era can be defined ; we can neither affirm nor deny. Positive Proof cannot be obtained of the Commencement of any Institution ; because the First Written Law relating to it may possibly be merely Confirmatory or Declaratory ; neither can the Non-Existence of any Institution be inferred from the Absence of direct Evidence. Written Laws were modified and controlled by Customs, of which no Trace can be discovered, until after the Lapse of Centuries ; although those Usages must have been in constant Vigour, during the long Interval of Silence. Many Questions, of great Importance in our present Form of Government, can only be decided by Reference to Laws or Usages, which have prevailed since the Time ‘whereof the Memory of Man runneth not to the Contrary ;’ and the Constitution of Parliament itself may depend upon the Exposition of the most obsolete Passages in the Laws of a Knut or an Edgar.”

Usages or Customs,—or by whatever Names the Saxon Institutes were called, which at once sanctioned and controlled the Prerogatives of the Basileus,—it is then certain, that, from the very Beginning, those Institutes did exist, and were Laws to the whole Commonwealth. So often as such Laws were, in after Times, opposed or impeded in their Jurisdiction, their Authority was declared and upheld against further Invasion, by the Charters granted, on every such Emergency, by the King and his Councillors or Witan. But each declaratory Charter marked, not the Introduction of the Law, but the Beginning of Disobedience. The Law existed long before : the Disobedience was of Yesterday. No Law was recorded upon the clerkly Parchment Roll,

save such as it was deemed necessary to declare in Force, or to determine in the Application. It was unnecessary to declare the Law, where its Obligation was undoubted, or to define the Application, where that formed no Part of the Matter of Dispute.

The want of Written Laws, therefore, in the early Period of English History, is no Argument to show that those Periods were lawless. On the contrary, the gradual Increase of Written Laws, and, more especially, of such as affected to declare the pristine or Common Law, has been ominously contemporaneous and commensurate with the Growth of Corruption and Betrayal. So true that is which a great Writer has remarked, that “whensoever a Nation loses its own Morality, by pretending to give itself a complete Code of Written Legislation, it thereby imposes upon itself the awful Necessity of embodying in that Legislation Morality itself. Such a Nation must be prepared to find Duties,—of Parents and Children,—of Masters and Servants,—and of every imaginable Relation of domestic Life,—examined and ascertained in the Pages of its new Code ; with the certainty that every Alteration in the Code must bring with it a new Examination and a new Arrangement of Duties. It was thus that, for Two Years after their Revolution, the Thirty Millions, who then inhabited France,—regenerated, like the Men of Deucalion and Cadmus,—were nevertheless in utter Want, not only of a Civil and Criminal Code, but even of a Religious Code,—doubted of their Competence to make Capital Punishment a *permanent* Law of their State,—and had not made up their Minds, whether the Ties of Family themselves deserved to be respected ;—less advanced in their Legislation,—in the Fourteenth Century of their History, and after trying so many Legislatures,—*than a Horde, emerging from its*

*Woods, with fixed Usages and Customs, needing but Compilation” (g).*

You must not expect from the brief Outline, which I am about to present to you, of the English Constitution in the Saxon Time, more than a very general Idea of its Essence and Operation. The social Habits of our Saxon Forefathers, their Tenures, their Forms of Procedure and Conveyance, and the like,—important as they undoubtedly are to the satisfactory Prosecution of any Enquiry into the Laws and Institutions of that People,—are Subjects which, having regard to the Limits imposed upon me, I must pass over to-day. But the Authorities to which I shall refer you, in the earnest Hope that you may be induced to make them your instant and unceasing Study, will more than supply all that I must leave unsaid.

England, before the Norman Conquest, was rather a Confederation of many States than an United Kingdom. The Landmarks of the old Octarchy still subsisted under Edward the Confessor; nor were these the only Sources of Division. The Danelaghe, or Territory subdued by the Scandinavian Rovers, retained, as its Name imported, under their less formidable Descendants, the Laws of those uncouth Conquerors. Many of the Earldoms, into which all England was divided, had once been Principalities; whose Mediatised Sovereigns, yielding to the Ascendancy of some one among the greater Chiefs who formed the Octarchy, or of the Basileus who replaced it, thus continued to exercise, by another's Authority, a Sovereignty no longer their own. But there was something, which, more than all of these, contributed to maintain intact the antient Laws and Liberties of the English Empire. It was the Social Organisation of

(g) Bonald, *Législation Primitive*, Discours Prélimin.; *prope Finem*.

its Inhabitants. From that Organisation the Empire itself had sprung into Existence. By that Organisation, it continued to be guarded and maintained. The one was but the Reflex of the other: they were obverse Sides of the same Escutcheon. The Empire of the Basileus of Britain was, upon a great Scale, that which each of its "Townships" was upon a smaller one. The Township was the Political Integer, that formed the Nucleus of every Form of Anglo-Saxon Society. The Empire was the largest Conglomerate of such Units. It is a fatal Mistake to regard the Question in any other Light; and yet it is One into which many erudite Partizans of Opinions,—various and hostile,—are continually falling.

It was so with all Teutonic Nations,—from the Periods when they successively became known to Europe, down to their common Degradation. They were accustomed to confederate for Foreign—that is, National Purposes,—and, as the Anglo-Saxons did in England—to recognise in some "Walda," or "Ruler," a Depository of the Power essential to their Accomplishment. But they were destitute of any Common Jurisdiction, which could interfere with that of the Judges of the "Centena," "Gau," or "Clan;" or which could supply its Place, where two or more of such Jurisdictions came into Conflict (*h*). Yet the Political Skill, which contrived the Confederation, was not less considerable than the Patriotism, which could conceive the Thought.

The Suevi were such a Federation. They consisted of a Hundred "Pagi," and the Contingent of each was a Thousand Warriors (*i*). So long as the Enterprise lasted, the Federation could not be dissolved; nor could the Power of Life and Death be taken from the Hands of Him whom, for

(*h*) De Bello Gallico, Lib. VI. c. 21.

(*i*) *Ib.* Lib. IV. c. 1.

the Common Weal, they had made the Common Magistrate. The Continental Saxons had Twelve "Aldermen" of equal Rank, from among whom their War-King was to be chosen by Lot; his Office ceasing with the Necessity that occasioned it (*k*). So long as it was elective, it of course was of merely temporary Duration. But, although originally unknown, save in its Combination with the precarious military Life, it began gradually to be resorted to for the Transaction of all Public Affairs and even in Times of Peace.

This great Change was closely accompanied by another, and as great an One. Elections became less frequent; and when the Office of the Emperor became more normal and familiar—and when, at a comparatively early Period, the Federation had become permanent,—the Elective General was replaced by the Hereditary Monarch.

Sir Francis Palgrave makes some interesting Remarks on the Etymology of the Anglo-Saxon Word "Cynehelm," which denoted at once the King's Helmet and Crown. He regards it as a significant expression of the Progress of Imperial Power in England, and by no means inconsistent with that Character for philosophic Refinement by which Anglo-Saxon Terms are justly celebrated. He observes, that "whilst the old Saxons fought under the Supremacy of their elected Emperor, he might be enabled to cause Justice to be dispensed between different Tribes of the armed Nations; and that thus the Allegiance, required by the General, gradually became the Fealty due to the Sovereign. Peace deprived them of their Common Magistracy; and the Cessation of external Hostilities was the Commencement of internal Disunion. But they possessed within themselves the Means of Amelioration; and their peculiar Policy afforded the Groundwork of the general

(*k*) Bedæ Hist. Eccl. Angl. Lib. V. c. 11; Leibnitz, SS. Rer. Brun. Vol. III. p. 292.



Government of the Community" (*l*). It is quite evident that, of such a Community, the Head could not act,—so long as the Concurrence of the Members could not be procured or was not demanded.

The Functions of every Teutonic Government, and more especially of that which existed among our Anglo-Saxon Forefathers, cannot be more truly illustrated than it is in one short Sentence of Tacitus. The Time is coming, (if it be not come,) when the following Passage will be believed to be no more deserving of Credit than any other Apologue or Mythus. Such Incredulity is pardonable. In England, it is not great National Concerns, but speculative Opinions of Party, and all the other miserable Details of Faction, which now command the undivided Attention of all. Interests once National are become "Foreign;" and, under that Denomination, handed over to a Minister of State, also—(and sometimes deservedly)—styled "Foreign." But Local Partisanship we hug to our Bosoms; and, since we consider it our "Home Policy," so we designate it!

Very different was the Manner of the former Teutons! "*De minoribus* Rebus, *Principes* consultant: de *majoribus*, *Omnes* ;—ita tamen, ut ea quoque, quorum penes Plebem Arbitrium est, apud Principes pertractentur" (*m*). Whether the "*Omnes*" are to be understood to mean all the Free, or Noble, Members of the "*Gau-ding*," or "*Concilium*"—as Eichhorn considers (*n*)—or whether the Term is to be limited to the Heads of their respective Families, and that even the Power of these was not co-ordinate with that of the "*Principes*,"—as Palgrave teaches (*o*)—is a Matter of comparatively very little Mo-

(*l*) Rise and Progress, &c., Vol. I. p. 111.

(*m*) De Germ. Chap. 11.

(*n*) Deutsche Staats-und-Rechtsgeschichte, Vol. I. pp. 46, 299.

(*o*) Rise and Progress, &c., Vol. I. pp. 86—7.

ment. If the Greater Affairs of State were, in Fact, propounded to the whole of the Tribe or People of the Centena—the Roman Historian assures us, that it was not until after they had been discussed and digested by the “Princes,” or Select Council of the Noble. If, on the other Hand, the Heads of Families, and not their inferior Members, were those consulted in that Appeal of last Resort, it is probable that these would have compensated, by their Wisdom, Experience, and Weight, for what they lacked in Numbers; and that the Weal of all would often prove to have been best consulted, by this Exclusion of the Majority from the Debate. In either Case there *was* Knowledge; there *was* Solicitude; there *was* Investigation. Judgment, however generated, did exist; and the guilty “Princeps” was always at the Mercy of its inevitable and unerring Censure.

The Genius of the Anglo-Saxon Government was eminently favourable to this patriotic Spirit of Inquiry.

On the Continent of Europe, the rapid Succession of Foreign Invasions concurred, with the seductive Manners of the old Society, in effacing or impairing much of the Traditions and Usages of the North. But those Circumstances were peculiar to the Continental Settlements of the Conquerors, and their Influence was in England unfelt. Here, the Institutions, which the Anglo-Saxons brought, in Germ, from the Shores of the Cimbric Chersonese, had Time and Space to develope themselves, until they reached unto a Maturity and Beauty which had never been witnessed elsewhere; and which other Tribes of the great Teuton Race had Cause enough to envy.

Sir Francis Palgrave has collected together, in his Work on the English Constitution, an astonishing Mass of Illustrations from the Laws and Charters of other Nations of the same Race. To them I beg to refer you. The following, however, appear to have escaped him. On that

Account, and also because of their striking Resemblance to our own,—and, above all, their Longevity, for they subsisted within the Memory of our Contemporaries,—I request your Attention to a short Statement of their leading Characteristics.

The contemporary Historian of the Emperor Joseph's Usurpations in the Netherlands, writing in 1785, when all the rest of England were loud in their Approbation of them, says (p), "It would not only be difficult, but probably now impossible, to trace up to the Source, the Origin of those municipal Privileges, which, in so early a Period of the Middle Ages, enabled the great Cities of the Low Countries to flourish in a Degree of Splendour that excited the Admiration of Mankind. Their Greatness, Wealth, and incredible Population, together with the Rank they held, and the Weight they possessed in the Political Affairs of Europe, are, however, indelible Monuments of the Security, with respect to Person and Property, which they enjoyed several Centuries ago. Brabant, in particular, formed a regular Constitution, which was ratified and sworn to by the reigning Prince at the Time, and which has been since confirmed and attested, in the same Manner, at their Accession, by his different Successors to the present Day. This is the Magna Carta of that Country, and is regarded with a greater Degree of Veneration, approaching almost to Idolatry, by that People, than even the former is by those in England. This Charter of their Rights and Liberties is, from a Circumstance attending its Execution, distinguished by the Name of the *Joyous Entry*. It had been first obtained from the antient Dukes of Brabant, more as a Specification and Record of Rights and Privileges, which they had then already long possessed, than as a Grant of new. It had been maintained and enlarged by their suc-

ceeding Sovereigns, the Dukes of Burgundy; and afterwards ratified and sworn to by both Branches of the House of Austria. No Change whatever could take place in the established Constitution, thus solemnly secured, without not only the Consent, but the positive Act, of the Three Estates of Brabant. The great Cities of Flanders, as well as those of the other Lordships and Territories, which are included under the general Name of Netherlands, all received, at different Periods, Ratifications of their respective Rights and Privileges; but the Constitution of Brabant is deemed the best defined and most perfect of the Whole.

“The Jurisdiction in the Villages of Brabant lies in the Lord of the Manor, or Barony, in which they are situated. The Lord delegates his Authority in common and trivial Cases, to plain reputable Men, who act as Magistrates in the respective Villages. In Cases of greater Importance, an Assemblage of these Village Magistrates compose a Court; but they are aided, and their Proceedings in some Degree controlled, by two Lawyers of Eminence, who expound the Laws, and act as Judges. An Appeal lies from the Verdict of a single Magistrate to the Manorial Court, and, in Cases of a certain Degree of Importance, from that to a superior Tribunal. It is the Interest of the Lord that Justice should be duly administered to his Tenants, and vexatious Law Suits prevented; and the Magistrates find it necessary, not only to preserve the good Opinion of their Neighbours, but cautiously to guard against the Disgrace of being deprived of their Offices by well-founded Complaints to the Lord. From this plain and simple Course of Rural Justice, the People passed their Lives in great Tranquillity, and knew little of the Vexation of Law Suits.

“The Jurisdiction in the Cities, not only with respect to Civil but Criminal Cases, was lodged in the Hands of their respective Magistrates. These were obliged, as a

necessary preparative Education, to be well versed in the Knowledge of the Laws, and, being selected from the most honourable Families, composed Tribunals of great Respectability and Independence. All the Magistrates, whether of the Cities or Villages, were obliged by the Constitution to be Natives of Brabant; and they were all bound by Oath to maintain inviolably the *Joyous Entry*, or Charter of their Rights and Privileges.

“But the supreme Tribunal of the Country is that seated at Brussels, and distinguished by the Name of the Council of Brabant. This eminent Tribunal, which has subsisted through a greater number of Ages than Records or History probably reach to, has through Time immemorial been held in the greatest Veneration. It is composed of Sixteen Judges and a President; the latter of whom is distinguished by the Name of the Chancellor of Brabant, and his Office considered as being of the first Trust, Dignity, and Honour. In many assigned Cases, this Tribunal judges in the First Instance, and is likewise a Court of Appeal in Civil Matters from the Sentence of the Magistrates in Cities and Villages.

“The Functions of this Tribunal are not however confined to the Administration of Justice. The Council of Brabant acted also as a Council of State; and no Act of the Prince was considered valid, or received as a Law, until it had been examined and approved of by the Judges of this Court, and until the Chancellor had affixed to it the Great Seal of Brabant, which was for that Purpose entrusted to his Care. As the Constitution had committed so great a Charge to this Tribunal, so it took every possible precaution to provide for the Character, Integrity, and Independence of the Judges, and still more particularly of the Chancellor. The *Joyous Entry* accordingly went minutely into this Business, accurately defining the Qualities and

Qualifications which were to be considered as indispensably necessary for the filling of Offices of so great Trust ;— among which the Possession of Estates to a considerable Amount within the Province was not forgotten.

“ The States of Brabant are composed of the Representatives of the Three Orders, of Clergy, Nobles, and Commons ; and the People looked on them as the Guardians and Conservators of their Laws, Liberties, and Property. To them only belonged the Power of imposing Taxes, and of granting Subsidies to the Prince ; in the Exercise of which Power, no Illiberality in their Grants was ever complained of on the part of the Prince, nor were the Taxes they imposed considered as Burthens by the People. The States possessed, and occasionally exercised, the Right of remonstrating freely with the Sovereign on the Measures of Government ; and they claimed, as a Right, the very essential and important Privilege, that no material Change could be wrought in the Constitution without their Concurrence.

“ In Brabant, the whole Representation of the Commons lay in the Deputies that were elected and returned to the States by the Three principal Cities of the Province, Brussels, Louvain, and Antwerp ; nor could any Tax be imposed, nor Subsidy granted, by the States themselves, until it was confirmed by the Approbation of these Three Cities. The Companies of Arts and Trades form a principal Member in each of these Cities ; and, as may be conceived, in a Country so early and so highly celebrated for its Skill in Arts and Manufactures, possess great and eminent Privileges, and include great Numbers of the most respectable Citizens. In Brussels, these Companies are formed into Nine Bands, or Nations, each of which is governed by a distinct Ruler, called a Syndic ; in whose Hands, acting as the Mouth, and under the Authority, of the Corporation, much Weight and Influence is lodged.”

Of the Jealousy with which every delegated Authority was measured and examined by those who gave it, the Proceedings which were adopted for an Accommodation with their Imperial Sovereign,—and which Proceedings were entirely successful,—afford an instructive Example. It is the exact Counterpart of many a Transaction, recorded in the Histories of England and other Teutonic States; and indeed of every antient State in the World, past or present, Christian, Pagan, or Mussulman. I continue to quote from the same Authority.

“Deputies from the States were appointed to proceed to Vienna; but they were entrusted with very limited Powers; being only charged to express the Loyalty of the Nation, and to represent their Grievances, and totally restricted from coming to any Conclusion, with Respect to public Affairs, without the special and immediate Authority of the States.”

Such were the Constitutions of Brabant.

I will mention only one other Example. The Federal Union of States, commonly called the Seven United Provinces, was in its Day a Commonwealth, mighty by Sea and Land, and, in every Circumstance of Dignity and Power, too great even for Comparison with that Third Rate Kingdom of Holland into which it has sunk. It was to their ardent Love for their antient Laws that their State owed all its Greatness:—and with the Extinction of those Laws began the Ruin of that State. But now the People bow down before the Idols of their own Election,—strange Gods, forged by Revolutionary France,—consecrated by the Congress of Vienna. Their Jurisdictions are usurped; their Rights destroyed; of the Seven States, Six were despoiled of Existence to make the Seventh a Kingdom. Yet in all we view but one Example of the common History of modern Decline. In all States there is the same Distaste for Law;—the same Appetite for Legislation;—the same In-

action of Justice;—the same Frenzy of Faction;—and, in the End, the same Destruction:—for it is the same, whether the Revolution be consummated under its own Name, or under the borrowed One of Restoration. It is but the Change of Masters. A Stuart King succeeds a decrepit House of Parliament; a Louis of Bourbon is substituted in the Place of a Napoleon;—the Factions have reversed their Positions;—that is all. The Laws are not restored. The Throne of the extinct Usurpation was planted among their Ruins, and the legitimate Prince ascends that Throne, and not the Throne of his Ancestors. The Name and Shadow of Right are restored; but in all its criminal Reality the Revolution subsists still.

In 1670, Sir William Temple compiled his “Observations upon the United Provinces of the Netherlands;” the Results of a Two Years’ Embassy, he tells us, in the midst of great Conjunctions and Negotiations among them. This invaluable Testimony to their actual Condition deserves your most careful Attention. He speaks of their “prodigious Growth in Riches, Beauty, Extent of Commerce, and Number of Inhabitants.” He extols “the Strength of their Natives, their Fortified Towns, and Standing Forces;” for they were at that Time in Arms against France; and their constant Revenue, “proportioned to the Support of all this Greatness.” He declares them, in Fine, to have arrived, at Length, to such a Height, as made them the Envy of some, the Fear of others, and the Wonder of all their Neighbours (*q*). And all these Advantages the profound Statesman who records them clearly traces to the antient Laws and Institutions of the Country; and these, with their Consequences, have long since disappeared. I request your Attention to a few Passages from

(*q*) Observations upon the United Provinces. Sir W. Temple’s Works, Vol. I. p. 58. (London, 1770.)



his Work. They may help you to connect the Information we have gained respecting Brabant with the immediate Subject of our present Enquiry.

The Seven States of the Union were Guelderland, Holland, Zealand, Utrecht, Friesland, Overysse, and Groningen. "Each of these Provinces," he says (*r*), "is likewise composed of many little States or Provinces, which have several Marks of Sovereign Power within themselves, and are not subject to the Sovereignty of their Provinces; *not being concluded in many Things by the Majority, but only by the Universal Concurrence of Voices in the Provincial States.* For the States General cannot make War, or Peace, or any new Alliance, or Levies of Money, without the Consent of every Province; so cannot the States Provincial conclude any of those Points, without the Consent of each of the Cities that, by their Constitution, has a Voice in that Assembly. And though, in many civil Causes, there lies an Appeal from the Common Judicature of the Cities to the Provincial Courts of Justice, yet, in criminal, there lies none at all; nor can the Sovereignty of a Province exercise any Judicature, seize upon any Offender, or pardon any Offence, within the Jurisdiction of a City, or execute any common Resolution, or Law, but by the Justice and Officers of the City itself. By this a certain Sovereignty in each City is discerned; the chief Marks whereof are the Power of exercising Judicature, levying of Money, and making War and Peace; for the other of coining Money is neither in particular Cities or Provinces, but in the Generality of the Union by common Agreement.

"The main Ingredients, therefore, into the Composition of this State are, the Freedom of the Cities, the Sovereignty of the Provinces, the Agreements or Constitutions of the Union, and the Authority of the Princes of Orange. But,

whereas the several Provinces in the Union, and the several Cities in each Province, as they have in their Orders and Constitutions some particular Differences, as well as a general Resemblance, and the Account of each would swell this Discourse out of Measure, and to little Purpose, I shall confine myself to the Account of Holland as the richest, strongest, and of most Authority among the Provinces; and of Amsterdam, as that which has the same Pre-eminence among the Cities.

“ The States of Holland have their Session in the Court at the Hague, and assemble, ordinarily, Four Times a Year, in February, June, September, and November. In the former Sessions, they provide for the fitting up of all vacant Charges, and for renewing the Farms of all the several Taxes, and for consulting about any Matters that concern either the general Good of the Province, or any particular differences arising between the Towns. But, in November, they meet purposely to resolve upon the Continuance of the Charge, which falls to the Share of their Province the following Year, according to what may have been agreed upon by the Deputies of the States-General as necessary for the Support of the State or Union.

“ For extraordinary Occasions they are convoked by a Council called the Gecommitteer de Raeden, or the commissioned Counsellors, who are properly a Council of State of the Province, composed of several Deputies; One from the Nobles, One from each of the Chief Towns, and but One from Three of the smaller Towns; each of the Three choosing him by Turns. And this Council sits constantly at the Hague, and both proposes to the Provincial States, at their extraordinary Assemblies, the Matters of Deliberation, and executes their Resolutions.

“ In these Assemblies, though all are equal in Voices, and any one hinders a Result, yet it seldom happens but

that, united by one common Bond of Interest, and having all one common End, of Public Good, they come after full Debates to easy Resolutions; yielding to the Power of Reason where it is clear and strong, and suppressing all private Passions or Interests, so as the smaller Part seldom contests hard or long what the greater agrees of. When the Deputies of the States agree in Opinion, they send some of their Number to their respective Towns, proposing the Affair, and the Reasons alleged, and desiring Orders from them to conclude, which seldom fails if the Necessity or Utility be evident. If it be more intricate, or suffers Delay, the States adjourn for such a Time as admits the Returns of all the Deputies to their Towns, where their Influence and Interest, and the Impressions of the Debates in their Provincial Assemblies, make the Consent of the Cities easier gained.

- "This is the Course in all Affairs before them; except in Cases of Peace and War, of foreign Alliance, of raising or coining of Monies, or the Privileges of each Province or Member of the Union; in all which all the Provinces must concur; Plurality being not at all weighed or observed. This Council is not Sovereign, but only represents the Sovereignty; and therefore, though Ambassadors are both received and sent in their Name, yet neither are their own chosen, nor foreign Ministers answered, nor any of those mentioned Affairs resolved, without consulting first the States of each Province by their respective Deputies, and receiving Orders from them; and, in other important Matters, though decided by Plurality, they frequently consult with the Council of State.

"Nor has this Method or Constitution ever been broken since their State began; excepting only in one Affair, which was in January 1668, when his Majesty sent me over to propose a League of mutual Defence with this State, and

another for the Preservation of Flanders from the Invasion of France, which had already conquered a great Part of the Spanish Provinces, and left the rest at the Mercy of the next Campaign. Upon this Occasion I had the Fortune to prevail with the States-General to conclude Three Treaties, and upon them draw up and sign the several Instruments in the space of Five Days, without passing the essential Forms of their Government by any Recourse to the Provinces, which must likewise have had it to the several Cities. There I knew those foreign Ministers, whose Duty and Interest it was to oppose this Affair, expected to meet and to elude it, which could not have failed in Case it had run that Circle, since engaging the Voice of one City must have broken it. It is true that, in concluding these Alliances without Commission from their Principals, the Deputies of the States-General ventured their Heads, if they had been disowned by their Provinces; but, being all unanimous, and led by the clear Evidence of so direct and important an Interest, (which must have been lost by the usual Delays,) they all agreed to run the Hazard, and were so far from being disowned, that they were applauded by all the Members of every Province; having thereby changed the whole Face of Affairs in Christendom, and laid the Foundation of the Triple Alliance, and the Peace of Aix (which were concluded about Four Months after). So great has the Force of Reason and Interest ever proved in this State, not only to the uniting of all Voices in their Assemblies, but to the absolving of the greatest Breach of their original Constitutions; even in a State whose Safety and Greatness has been chiefly founded upon the severe and exact Observance of Order and Method, in all their Counsels and Executions. Nor have they ever used, at any other Time, any greater Means to agree and unite the several Members of their Union in the Resolutions neces-

sary, upon the most pressing Occasions, than for the agreeing Provinces to name some of their ablest Persons to go and confer with the dissenting, and represent those Reasons and Interests by which they have been induced to their Opinions.

“ The Council of State is composed of Deputies from the several Provinces ; but after another Manner than the States-General ; the Number being fixed. Guelderland sends Two, Holland Three, Zealand and Utrecht Two a-piece, Friesland, Overysse, and Groningen, each of them One ; making in all Twelve. They vote, not by Provinces, but by personal Voices ; and every Deputy presides by Turns. In this Council the Governor of the Provinces has Session, but a Voice only deliberative ; yet he has much Credit here, being for Life ; and so is the Person deputed to this Council from the Nobles of Holland, and the Deputies of the Province of Zealand. The rest are but for Two, Three, or Four Years.

“ The Council of State executes the Resolutions of the States-General ; consults and proposes to them the most expedient Ways of raising Troops and levying Monies, as well as the Proportions of both, which they conceive necessary in all Conjunctions and Revolutions of the State, —superintends the Milice, the Fortifications, the Contributions out of the Enemies’ Country, the Forms and Disposal of all Passports, and the Affairs, Revenues, and Government of all Places conquered since the Union ; which, being gained by the Common Arms of the State, depend upon the States-General, and not upon any particular Province.

“ Towards the End of every Year, this Council forms a State of the Expense they conceive will be necessary for the Year ensuing, and presents it to the States-General,

desiring them to demand so much of the States-Provincial, to be raised according to the usual Proportions."

If, from the Contemplation of these Laws and Institutions of other Members of the great Teutonic Family of Nations, we turn to the Study of our own, we shall find the same Characters recurring there, with even happier Development;—in the Anglo-Saxon Monarchy, as under the Aristocracy of Brabant, the Powers of the whole State concentrated in an Imperial Authority, but the Administration everywhere, and always local, and in the People's Hands.

It was only through the Subject's Relations to his Sovereign that his Relations to the other Subjects of his Sovereign were determined. The question of Natural-born Subject or Alien had Aspect only and wholly unto the Sovereign. Whether Alien, or Natural-born Subject, he was so accounted in Law only in Respect of the Sovereign. No Man who was not born an Alien to Him could be an Alien to any of His Subjects (s).

This Consideration must be my Excuse with you for pursuing the Question a little further. In every Stage of our Enquiry, the Advantage of an early and accurate Knowledge of the Nature and Qualities of Allegiance becomes more evident.

By the Law of England the Allegiance of the Subject was born with him. It was a personal Allegiance. It was an Allegiance permanent and indelible. It was absolute, and admitted not of rival or co-ordinate Allegiances. And by whatever Allegiance he might be bound towards other Powers, that was but a Local or National Allegiance subordinate to the First, and in all Respects to be regarded as if it had made of the First an express verbal Reservation.

(s) 7 Rep. p. 25, a. b.

By no such Subjections could he divest the Subjection and Allegiance that he first owed to his lawful Prince (*t*).

No Doubt—he might, by his own Act,—as for Instance by a Change of Domicil,—bring himself under the Obedience of a foreign Prince, and so occasionally, as Lord Hale remarks, be brought within great Straits. Allegiance so acquired or superadded is termed Local Allegiance.

But Local Allegiance, to the one Sovereign, could not impair or detract from the Personal Allegiance, due to the other Sovereign. It could not make the Subject of the latter less a Subject, than he would have been, had the other Relation not existed. It could not narrow—much less take away—any Rights vested in the Liegeman by his Birth. Of this the antient Law of Homage, as it subsisted in England under the Saxon and Norman Kings, affords an interesting Example.

Every Man in the Realm owed Allegiance to One Sovereign. But that Allegiance was defined and qualified by Law. English Allegiance was then, what it is now, a conditional and limited Allegiance—in Respect to the Liegeman himself,—but absolute and indelible—in Respect to foreign States. The following Observations will satisfy you of the Importance of this Distinction.

Lord Hale describes Homage as being of Three Kinds ; viz., 1, Lige Homage, or Professed Ligiance ; 2, Feudal or Simple Homage, as that which is performed by Virtue of Tenure only ; and, 3, Mixt Homage, or Homage partly Lige and partly not ; as where a Vassal does Homage to an Under King, or where an absolute Sovereign Prince hath also a Vassalage or Possession in another absolute Prince's Dominions (*u*). Of these Three the Two First may, fitly for our present purpose, be considered as including every Kind of Homage, viz., “ Lige Homage ; which principally binds

(*t*) 1 Hale's P. C. 68.

(*u*) 1 P. C. 70—74.

the Person, and hath no Exception of Homage done to Others ;” and “ Feudal Homage, that is, simply such ; wherein there is always an Exception of the Faith due to the King, and which binds only *Ratione Feodi*.” If the Homager in the latter Case alien or surrender his Fief, he is discharged of his Homage, for it was Local only. But, in the former Case, though the Fief itself be alienated or surrendered, yet the Obligation of Lige Homage continues (*x*).

Although, from the earliest Times, the Principle of Double Allegiance was recognised by English Law, this Principle of Single Allegiance, as subsisting together with Double Homage, was much better known. The Homage which English Natural-born Subjects, *ad Fidem utriusque Regis*, performed to the Foreign Suzerain, was, in general, not *purely Lige Homage*, but *Feudal Homage*. In the Event of War between the Countries, it was said, “ *remaneat personaliter quilibet eorum cum eo, cui fecerat Ligeantiam, et faciat Servitium debitum ei, cum quo non steterat in Personâ*.” Therefore the foreign Fief, in such Cases, was usually seized into the foreign King’s Hands, until the End of the War, and then restored to the Vassal (*y*).

But, if the Subject made Lige Homage to the Foreign Suzerain, then, and then only, the Successes of either Side, and of either equally, rendered him personally liable to receive those Punishments which followed Breach of Allegiance. On this Point, besides the Authorities collected by Lord Hale (*z*), the Statutes and Rolls of Parliament, but, above all, the Scottish Border Laws, may be consulted (*a*).

(*x*) Terrien, sur les Coustumes de Normandie, Lib. III. c. I.

(*y*) Bracton, Lib. V. Cap. 24, Tr. 5 ; Calvin’s Case, 7 Rep. 27 ; and the Records collected by Hale, 1 P. C. 69.

(*z*) 1 P. C. 69, 70.

(*a*) III. Rot. Parl. (1 Hen. IV. n. 77, p. 427, and 11. Hen. IV. n. 31, p. 627 ;) *Leges Marchiarum* (Hen. VI. Sec. 16, p. 19 ; Edw. IV.



Even in that Case, the *Act of Allegiance* to the Foreign Prince did not operate to make the *Homager a Subject of such Prince*, or to take away his Character of *English Subject*. In the *Leges Marchiarum*, or Scottish Border Laws, for Instance, the Words "*Ligei*" and "*Lieges*" are applied indifferently to the Natural-born and the adventitious *Lieges* of either Sovereign. But the Words "*Nati*," "*Subditi*," and "*Subjects*," are employed specifically to denote the Relation of *Lieges* to their original Sovereign; which Relation, it appears, still subsisted, even where,—*de Facto*, and in the merely local Sense in which that Word is now commonly understood,—they were no longer His Subjects (*b*).

Under the same Restrictions the Principle of Double Allegiance is still a known Principle in our Law, and constantly in Operation. Not an Alien who visits this Country, not a Natural-born Subject who goes abroad,—but affords in his Person an Example of Double Allegiance. In addition to their *permanent* Allegiance which they carry with them wherever they go—from the Moment that they touch the Soil of the foreign Country, there attaches to them a *local* Allegiance to its Sovereign, which remains with them as long as they remain there. It is in this Sense that, by our own Law, when an Alien is indicted for Treason done here, it is said to have been done *contra Ligeantiae suæ Debitum*. Yet he remains an Alien in every Sense of the Term; and, notwithstanding that temporary Allegiance, a foreign Subject to all Intents and Purposes whatsoever.

I am happy to have this Opportunity of putting you also

Sec. 12, p. 36, Sec. 14, p. 37, Sec. 25, p. 43; and Edw. VI. Sec. 7, p. 61, Sec. 12, pp. 64—5,) the Statute de Prærogativa Regis (17 Edw. II. c. 12; De Terris Normannorum): and 2 Reeve's English Law, Chap. XII. p. 309 (2nd Ed.)

(*b*) *Leges Marchiarum*, *suprà* (Loc. citat).

upon your Guard against another favourite Delusion of the Day on this Subject of Allegiance.

Upon no better Foundation than the Speculations of a Publicist, it has been assumed that the Rights of the Sovereign and the Rights of the Subject are so thoroughly reciprocal, that, where the one ceases or is suspended, the other ceases or is suspended too; and that the one cannot be lessened or impaired, without the other being weakened in proportion. Such Positions are unknown to the Law of England. It is not from Compact or Reciprocity, but from Birth, that the Queen's Claim to Subjection and Her Subject's Claim to Liberties arise. Both Claims spring together and from the same Source. The Subject's Life is the natural Term of both: Yet it is always possible that one of them may be determined incidentally and before its Time. The Subject may forfeit his "Liberties," or the Queen may, by Her own Act, withdraw him from Her "Subjection." In the First Case, the Queen is not deprived of Her Subject, notwithstanding his Forfeiture of Right. In the Second Case, albeit no longer *de Facto* true and "lawful," he still retains the Rights which were vested in him by his Birth (c).

There is indeed a close Connection between this Fallacy and the Proposition of American Jurists,—false as we have seen it to be,—that it is in the Power of the Citizen to renounce his Allegiance, and, without the Consent of his Sovereign, to take upon himself, in all Respects, the Character and Rights of a Citizen of a foreign State.

To this Pretention it is once for all to be replied, that the Character of British Subject,—once vested *by Birth*,—cannot be extinguished or suspended by the mere Adoption of any foreign Allegiance. The Party may withdraw himself from the Local Obedience and Protection of his

(c) Reeves's Law Tracts, Reply, &c. pp. 5, 6.

Sovereign, and yet not cease to be within Her actual Obedience and Protection (*d*). He may place himself beyond the Jurisdiction of the Public Justice of his Country, and thus forego its Benefits; but he cannot place himself beyond the Jurisdiction of the Executive Power. The Queen's Remedial Writs cannot by any Means extend into his foreign Domicil; but those that are Mandatory and not Remedial do reach him even there. *They* are not tied to any Place, but do follow Subjection and Ligiance in what Country or Nation soever the Subject is (*e*). Amittit *Regnum*, sed non *Regem*. Amittit *Patriam*, sed non *Patrem Patriæ* (*f*).

I feel that I have digressed somewhat largely from the immediate Subject of Enquiry; but I also feel that the Digression may have been an useful One. I now resume my Subject.

The Authority of the Anglo-Saxon Kings was sovereign and transcendent. "In your Hands," said King Edgar to His Clergy, "is the Sword of Peter. The Sword of Constantine is in Mine."

The "Hyld-Oath," or (Oath of Fealty), bound all Men to be His Vassals, and, as such, to be "beholden unto Him, and true; loving all that He loved; and shunning all that He shunned, whether in Kinsfolk, Neighbours, or Strangers, without Strife or Sedition, open or private, according to God's Laws and World's Laws; and never, willingly or unwillingly, by Word or Deed, to do aught that was hateful unto Him; on Condition that He kept them, as they were willing to earn, and all that fulfilled, which was agreed upon between them, when they yielded them unto Him, and chose His Will" (*g*).

(*d*) Calvin's Case, 7 Rep. p. 8, a.      (*e*) 7 Rep. p. 20, a.

(*f*) Ibid. p. 9, b.      (*g*) Leg. Ang. Sax. p. 63; Brompton, p. 859.

Sir Francis Palgrave has collected the Titles of the Monarch. He was "the Basileus of Britain," "the King of all its Nations," "the Monarch of all Albion, and of all the surrounding Islands," "the Ruler of all the Land within the British Seas," "the Defender of the Britons," "the Governor of the Pagans," "the Emperor of the Anglo-Saxons and Northumbrians" (*h*). The Use of the style "Basileus," as the same learned Writer (following Ducange) remarks, is peculiarly important, since no other Sovereign in Western Christendom presumed to write himself like the Eastern Cæsars. And the Evidences of a constant Intercourse between England and Constantinople are too numerous to permit us to believe, that this Hellenism was a merely ignorant Assumption on the Part of vain Men who knew not its Import. Moreover, the Fragments of Saxon Laws, still left us, attest the Acquaintance of our Ancestors with the Civil Law and its technical Languages. Aldhelm is said to have made himself, in an especial Manner, the Master of its Secrets (*i*).

The Title of "Basileus" continued to be worn by Anglo-Saxon Kings down to the Norman Conquest. Edward the Confessor was the last Monarch of the Saxon Line, and from him, we find his "good Cousin" the Conqueror, claiming to have received it by a special Inheritance. But the Norman seemed to claim it under a Kind of Reserve, and none of his Successors, except Henry I., and, perhaps, Richard II., were solicitous to maintain it (*k*).

Thus the Existence of great constitutional Restrictions on the Exercise of Power was not considered by Anglo-

(*h*) Rise and Progress of the English Commonwealth, Vol. I. pp. 627—647; App. pp. cccxlii. to cccxliv.

(*i*) Vita Aldhelmi, p. 6.

(*k*) Rise and Progress, &c. Vol. I.; App. p. cccxliii.; 20 Ric. II. n. 28. (III. Rot. Parl. p. 343, *a*.)

Saxons, inconsistent with its Sovereign and transcendent Character. Central Administration was indeed kept back, but Central Power was maintained. The Ascendancy of the Crown was, on the whole, perhaps greater than it ever became under the Dynasty which more immediately succeeded.

But the Restrictions on the Exercise of that Power were not the less stringent. The Monarch was not permitted to deceive Himself as to the Tenure of His Authority. His Responsibility to God and the Ministers of God, for the Discharge of His Duty to Man, formed the Matter of the dread Oath which He swore at Coronation, and before every "Witenagemot." There are Passages enough in every Reign to illustrate our Position, and I need not enumerate them. Far less am I reduced to dwell upon the Humiliation of such a Reign as that of Etheldred, in Order to establish the conditional Character of Anglo-Saxon Allegiance. I shall adhere to a great Name already cited, and furnish myself with the high Example of the Glorious Edgar Himself.

"This Writing," says a contemporary Manuscript (*l*), "is copied, Letter by Letter, after the Writing, which *Dunstan the Archbishop* delivered to our Lord at Kingston, on the day on which they hallowed Him King, and forbade Him to give any Pledge but this Pledge, that He upon Christ's Altar laid, so as the Bishop Him dight (*appointed*)."

"In the Holy Trinity's Name, I vow Three Things to Christian Folk, and Myself bind thereto. First, that I to God's Church and all Christian Folk of My Realm, true Peace will hold. Another is, that I will forbid Robbery, and all unrighteous Things, to all Estates of Man. The Third is, that I vow and promise, in all Dooms, Right, and

(*l*) Reliquiæ Antiquæ, Vol. II. p. 194.

Mild-heartedness : so that us all the Gracious and Mild-hearted God, through His everlasting Mildness, may forgive: Who shall live and reign !”

It was natural, that the Authority, which enacted such an Oath, should possess the Means of enforcing its Conditions. Religion always held a high Place in every Keltic and Teuton Commonwealth. What I have observed of the Judicial Authority, belonging, in the early British States, to the Druids, is exactly paralleled by the Account of the German Priesthood as given by Tacitus. “*Neque animadvertere, neque vincere, ne verberare quidem,*” says the great Roman Historian (*m*), “*nisi Sacerdotibus permissum ; non quasi in Pœnam, nec Ducis Jussu, sed velut Deo imperante ; Quem adesse bellantibus credunt.*” In the Councils, or “*Gemoten*” of those Warriors, “*Silentium per Sacerdotes, quibus tum et coercendi Jus est, imperatur.*” Of their Auguries he says, that the Priests themselves, “*se Ministros Deorum, illos conscios putant.*” The whole Body of the German Laws was united to the Worship of the avenging Gods. When the Doomsmen assembled to declare the terrible Sentence, it was before the Altars of Thor or Woden. It is easy to conceive that the Effect, which Christianity produced upon this deep mystic or religious Feeling of our Forefathers, was rather to divert it into proper Channels than to extinguish it. The Abbey of Corbey replaced the Eresburgh of Irmin ; but its “*Frey Feld Gericht*” remained, under Monastic Rule, that which it had been when Irmin’s Priests directed it (*n*). It was the same in England. The Saxons transferred their local Traditions, their hereditary Venerations, their particular Views on the Mythological Origin of their Laws and Insti-

(*m*) De Germania, Cap. 7, 9, 10.

(*n*) Meibom. de Irm. Sax. Cap. IV.

tutions, to every Soil on which they planted Settlements. To this Day, certain English Territorial Jurisdictions are said to offer some very faint Vestiges of their Connection with old Pagan Policy (o). But, in Truth, the Christianity which pervaded all the Anglo-Saxon Jurisdictions, was of itself the clearest Vestige of that Connection. Eminently religious from their Foundation, they continued so, after the Faith of Christ had replaced the Worship of Thor throughout England. They did but exchange one Religion for another,—a false one for a true one. And the Priests of the new Law, in succeeding to the Spiritual Offices once filled by those of Heathendom, inherited at the same Time their Temporal Supremacy. You will contrast this with the Thoughts and Acts of these Erastian Times.

The Laws of our Forefathers demanded, at the Hands of their Church, Protection and Furtherance; and they received what they demanded; for then the Law and the Practice were inseparably one. The Law in this Respect is still the same; but the Practice is no more! But no Man, of any Capacity of Thought, even in these Times, can view, without admiring, that transcendent and supreme Control, in Matters of a Temporal Aspect,—which was claimed and exercised by the Priests and Prelates of the Anglo-Saxon Church,—was authorised by the Law,—and was acquiesced in by the Basileus and Nobles. Of such a controlling Power, reposed in such Hands, and so employed and enforced, no wise Man can depreciate the Value or decry the Influence.

The Ecclesiastical Hierarchy of the Anglo-Saxons is said to have been One of the most efficient of the Bonds, which girded their Empire together. It furnished a Model for the common Association of the Temporal Estates. It familiarised the King, the Under-Kings, and the Great Men of the Witenagemot, with the Idea of One Grand

(o) Rise and Progress, &c. Vol. I. App. p. clvi.

united Jurisdiction, resting upon a Number of inferior Ones for Support. In it they beheld a complete harmonious Plan of territorial Representation; a great, influential, highest Class, brought together at One Time and Place, and acting together, and in Obedience to One Impulse and One Mind (*p*).

The Bishops acted under the Sanction of the Canons. Their Diocesses were unconfined by those territorial Restraints—(Relics of the Octarchy)—which curbed and hindered the temporal Jurisdictions. The Inequalities of Provincial Rights affected not theirs. The Synod was convoked, Twice a Year, in each Diocess; and all the Clergy of the Diocess resorted thither, regardless of those local Distinctions which would have separated them in a Temporal Court. The same is observable of the Metropolitan Councils, summoned by their respective Archbishops of York and Canterbury. The Obedience due to the Pallium was identical, in whatever Principality the Diocess might be situate. In the Metropolitan Councils, sometimes the King, sometimes the Archbishop, “presided;” but they were always “directed” by the Archbishop (*q*).

These Councils and Synods watched over the Purity of Morals, no less than over the Maintenance of Faith and Discipline. The hardened, and especially the powerful, Offender, was denounced by the Mass-Priest whose Parishioner he was (*r*), or by the Bishop his Diocesan. The King was equally amenable with the Subject. In the Charters we find a Record of the Controversies which were liquidated before that Tribunal. We read of the Equitable Jurisdiction of the Church, as of One which embraced all

(*p*) Rise and Progress, &c. Vol. I. p. 637.

(*q*) Codex Diplomatum Anglo-Saxonum, Vol. I. pp. 227, 280, *et passim*.

(*r*) Dunham's Middle Ages, Vol. III. p. 310.



Manner of Men and of Suits. As in those between Man and Man (*s*), or between Church and Church, or Church and People (*t*), so in those between the Church and the King Himself, or the Heir Apparent (*u*), the Ecclesiastical Council was still the Forum of the Parties. The bold Churchman, strong in the People's Love (*x*), does not hesitate to stigmatise the "Rapacity" of the Monarch whose lawless Act he nullifies with "Our Lord's Help," and by the just Judgment of the Synod (*y*). Nor was that Judgment always defeated by the Death of the Royal Offender. Once when the Gravity of the Crime had been such as to call for posthumous Chastisements, it is recorded by Venerable Bede, how that such a Council expunged from the Annals of its Time the Name and Reign of the newly deceased Sovereign (*z*).

"The Church of Christ in Canterbury, Mother and Mistress of the other Churches of our Kingdom, shall, together with all unto Her belonging, always and everywhere be *Free*, save only as to the Fyrd (or Expedition), and the building of Bridges and Forts" (*a*).

In that Declaration of King Edgar there spoke the common Voice of Anglo-Saxon Law. The Mass-Priest was not liable to Tribute or Tax in Respect of his Tithes, or Spiritual Oblates. For his Lay-Fee (if he had any) he was to render to his Lord all due Services. But, for his Glebe Land, or Ecclesiastical Fee, he rendered no secular Service beyond that "*Trinoda Necessitas*,"—Fyrd, Brycg-

(*s*) Cod. Diplom. Anglo-Sax. Vol. I. pp. 99, 227; Vol. II. p. 19.

(*t*) *Ib.* Vol. I. pp. 188, 201, 221, 223, 276.

(*u*) *Ib.* Vol. I. pp. 173, 231, 280.

(*x*) Bede, Hist. Eccles. Lib. III. Cap. XXVI. Sect. 239.

(*y*) Cod. Diplom. Anglo-Sax. Vol. I. p. 231.

(*z*) Hist. Eccl. Lib. III. Cap. II. Sect. 151; Cap. IX. Sect. 175.

(*a*) Cod. Diplom. Vol. II. p. 347.

Bote, and Burh-Bote. Even this Reservation was omitted in many, and eventually (if the Interpretation which some have made of Ethelwolf's famous Charter be correct) it was released altogether (*b*). The *particular* Immunities conferred on Churches and Monasteries it is scarcely possible to enumerate. Out of 527 Charters contained in Mr. Kemble's Collection (*c*), there are not less than 181 Free Grants of this Character; and besides these, 16 more are the Fruit of Purchase. It was declared, that they should not be forfeited nor resumed, whatever Guilt their Occupants might subsequently contract.

"Let them be doomed to the cleansing Pains of Judgment as the Rule prescribeth; but be the Franchises of the Most High inviolate! God, to whom these Things are given, never did and never shall fall into Guilt. Then let the Franchise last for Ever, for God its Lord is Everlasting" (*d*).

These Immunities were sometimes transferable to the Purchasers of the Lands to which they were attached (*e*). Sometimes they were granted by special Charter, in Respect of Lay Lands that already belonged to the favoured Church or Abbey (*f*). Sometimes, instead of an Immunity, the King's or Lord's Right to the Tolls or Services in Question was transferred to the Spiritual Power for its own Emolument (*g*). At other Times (and those were of most frequent Occurrence) it was most emphatically declared, that the Subject Matter of the Grant should pass from its State

(*b*) Rise and Progress, &c. Vol. I. pp. 156—63.

(*c*) Cod. Diplom. Anglo-Sax. Vols. I. and II. London, 1839—40.

(*d*) *Ib.* Vol. I. p. 164; Vol. II. p. 435.

(*e*) *Ib.* Vol. I. pp. 239, 241, 249.

(*f*) *Ib.* Vol. I. pp. 264—301.

(*g*) *Ib.* Vol. I. pp. 196, 313.

of Subjection to "Royal Law," into "Church's Freedom," or "Church's Law" (h).

"The Superior," says Lingard, "was frequently invested with the Civil and Criminal Jurisdiction; and, throughout the Domain attached to the Church, he exercised the Right of raising Tolls on the Transport of Merchandise; of levying Fines for Breaches of the Peace; of deciding Civil Suits, and of trying Offenders within his Courts. The Authority of the Clerical was exercised with more Moderation than that of the Secular Thanes. Men quickly learned to prefer the Equity of their Judgments to the hasty Decisions of warlike and ignorant Nobles. The Prospect of Tranquillity and Justice encouraged Artificers and Merchants to settle under their Protection. Thus the Lands of the Clergy were cultivated and improved. Their Villages were crowded with Inhabitants. The Foundations were laid of several among the principal Cities of England" (i).

The Piety of the Age was Active, while it was Ascetic. The Clergy did not fear to come abroad into the Courts and Camps of Kings, and Assemblies of the People. Unlike the Frank, the Anglo-Saxon did not lose his Citizenship by taking Holy Orders. *That* was the Consequence of a Maintenance of the Old Empire, and its Laws, in the Hands of those who conquered it. But that Imperial Succession had found no Place in England. Here, in many Respects, the Clergy were subject to the same Law with their Flocks. And, although, in other Respects, they enjoyed Immunities, such as we have glanced at, there is nevertheless more than one honourable Passage in Anglo-Saxon History, where the Patriot Possessors of those Privileges generously waived

(h) Cod. Diplom. Anglo-Sax. Vol. I. pp. 48—213; Compare pp. 92—310.

(i) Antiquities of the Anglo-Saxon Church, p. 81.

them in the Hour of Need, and came forward like other Citizens in the Service of the Commonwealth (*k*).

The Clergy received on every Side an unfeigned Respect, and exercised an unbounded Influence. They were esteemed the highest Class of the Community. The unusual Value set upon the Compurgatory Oath of the inferior Clergy,—the total Exemption from it, which, in Common with Royalty, the Bishops enjoyed,—and the equal Rank with the “World Thane” in which the “Mass Thane” stood (*l*),—are some of the least among the Examples, which attest the proud Supremacy of the Anglo-Saxon Church. That was not merely a Spiritual Supremacy. If Kenwulf, the Mercian King, openly acknowledged that the Apostolic “Privilege”,—to which, as much as to “the unanimous Assent of his Nobles,” He owed His own “Inheritance,”—came to Him from the Apostolic Pontiffs, Leo and Paschal, with the Authority of Blessed Peter, Prince of “the Apostles” (*m*),—it is not difficult to believe, that the Subjects of the Monarch revered no less, in their Degree, the Spiritual Subjects and Representatives of those Pontiffs. Nor can we wonder at the Authority wielded by St. Dunstan, when we find his Name among the Witnesses to the Charter in which his Sovereign, Edred, the Basileus, acknowledges the same Temporal Jurisdiction of the Holy See. “Substituted” for His infant Nephew “by the Choice of His Nobles”—He, “*by Pontifical Authority, is Catholically consecrated to be their King and Governor*” (*n*). The Imperial Diadem of Britain was placed upon His Brow by the Head and Chief Representative of Christendom. It was thus that the new Monarch bestowed the Hue of Right

(*k*) Cod. Diplom. Anglo-Sax. Vol. II. p. 93.

(*l*) Rise and Progress, &c. Vol. I. p. 164.

(*m*) Cod. Diplom. Vol. I. p. 245.

(*n*) *Ib.* Vol. II. p. 268.

upon the doubtful and informal Succession, which, for the Time, postponed the nearest Heir. "He was vindicated by the Law of the Church" (to borrow Sir Francis Palgrave's Words on another Occasion). "The Law of the Church was then the Law of Nations; and Public Opinion, in all Times the strongest Support to a Monarch, was guided by the Sanction thus given" (o).

Thus, subject to the general Jurisdiction of the Popes, the Anglo-Saxon Church obtained a vast Share in the Administration of State Affairs. That Share was not always of an uniform Complexion. The Ecclesiastics indeed never slumbered over their Authority;—but, when they exercised it, it was sometimes to obey, and at other Times to control, that of their Sovereign. We find them at One Period blending their own Administration with that of the State. At another, they present themselves as Occupants of One Half of the divided Empire. The very Men, who extended to the Criminal, fleeing from Temporal Justice to the Church's Sanctuary, the Shield and Shelter which he claimed of them, were, beyond those Precincts, foremost in exacting the Penalties of Crime. We are about to behold the Prelate presiding in every "Gemot," or Court, Side by Side with the Temporal Authority. If we may argue from the well-known Constitution of the "Witenagemot" (p) to that of every inferior Court of Justice, we must conclude that, without the Presence of the proper Ecclesiastical Judge, not One of them could be lawfully assembled. There is even Reason to believe that, like the King or Alderman, every Prelate could summon a Court wherever he happened to reside. Eadmer mentions that, One Day, when Dunstan the Primate had under safe Custody Three convicted Coiners of False Money, he asked the People, whether Jus-

(o) Rise and Progress, &c. Vol. I. p. 525.

(p) Dunham's Middle Ages, Vol. III. p. 311.

tice should not be done upon them? They suggested that, the Day being a Festival, and the Prelate being about to say Mass, it might be better to defer Justice to another Day. The Archbishop declined their Counsel. "I will not approach the Altar," said he, weeping with Emotion, "until these Men have suffered the Penalty of the Laws. I have a Duty to fulfil to the Widow, the Orphan, and the Humble, whom these have wronged; nor, by false Pity, must I suspend their Chastisement, and so encourage others to the Crime." But, so soon as Justice had been wrought upon the Culprits, adds his Biographer, "then did the Prelate wash his Face, and, with a more cheerful Step, ascend the Altar."

He had accomplished the Vindication of the Temporal Law, the nearest and most incumbent of the Duties which that Day oppressed him; for it was a "Day of the King's Peace," as the Anglo-Saxons emphatically designated every Period allotted to public Justice.

But, had it been in a Period of "Vacation," the Mercy of the Canon Law would have cast out the Rigor of the Penal Code, and the Prelate have triumphed over the Judge. The Days of "Vacation" were peculiarly that which the Law of the Land had styled them; "Days of God's and Holy Church's Peace." At various Times, the Church had assigned certain Seasons of the Year to an Observance of Religious Peace, during which all legal Strife was strictly interdicted. Only what remained of the Year not disposed of in this Manner, (and it was but a trifling Portion of it,) was allotted to the State, for the Administration of Justice. The Anglo-Saxons had been governed by those Reasons, in distinguishing, as we have seen they did, the Periods of "Vacation" and "Term" (q).

"Neither was this all. On every Sunday, and every

(q) *Reeve's Hist. of English Law*, Vol. I. pp. 207—8.

Holyday during Lent and Advent, Feuds were suspended. On these Days, which were peculiarly consecrated to the Service of God, the Hostile might meet in Safety; and, if they pleased, amicably converse under the Sacred Mantle of the Church. That such an Institution, the wisest and most humane on Record, would often lead to the permanent Reconciliation of the Parties, is undoubted. We may add, that none were permitted to approach the Tribunal of Penance or the Sacerdotal Altar, who did not, from their Hearts, forgive the deepest Wrongs they might have received. Subsequently the invisible, but all-powerful, Ægis of the Church was thrown over the Man, who hastened to public Worship,—who obeyed the Summons of a Bishop,—who travelled to an Episcopal Synod, or National Council. Severe was the Chastisement of the Man, who presumed to violate this Ecclesiastical Privilege,—a Violation regarded as a Crime of the blackest Dye. This, with the Right of Sanctuary, recognised in the Royal Palace and the Pax Regis, within a certain Distance from the Place where the King might happen to abide, will be remembered to the Honour of the Saxons, or rather to that of the Church, while Human Records exist" (r).

Cared for by such a Church, we can the less wonder at the Permanence of the Commonwealth, and the steady Development of its Institutions. So completely indeed had these imbued themselves with the vital Principles of Christianity, after they had thrown off the Paganism to which they owed their Birth, that, misled by the Circumstance, One of the oldest Popes, in His Letter to an Anglo-Saxon King, declares, that the greater Perfection of the English Constitution, when compared with that of all other European States, is to be accounted for, because "they are based

on the Theodosian, or an originally Heathen, Code, while the Constitution of England had drawn its Forms and Provisions from Christianity, and received its Principles from the Church" (s). The Error here consisted rather in Words than in Substance. The true Expression would have been, that the National Constitution was originally derived from the old National Religion ; and that, when the Nation became Christian, the Constitution, without ceasing to be Religious, abandoned its Paganism, and received better Principles from the Christian Church.

It is with considerable Regret that I snatch myself away from the further Examination of this most important Subject. My Space warns me to proceed to the other Portion of my Task. But, in the Investigation of the Temporal Institutions which, in their Aggregate, formed what is called the Anglo-Saxon Commonwealth, you will endeavour to keep in Mind what we have said of the transcendent Influence of Religion over that Commonwealth. The Church was the greatest Fact in every Constitution of the Middle Age, and more especially in that of the Anglo-Saxon. As yet the unhappy Controversy of Investiture by " Ring and Staff" was wholly unknown to England. The Feudalism of the Anglo-Saxon Time afforded no Place for Jealousies.

The Effect of the Anglo-Saxon Institutions was to centralise in the Sovereign all the Power of the State, and to make all Administration local. He was the sole Representative of the Confederacy ; but a Number of inferior Jurisdictions were the Wheels by which that Confederacy was worked. Of the whole Body Politic the Sovereign was absolute Head. But the Head, though the Chief Part, is

(s) Lectures on the Doctrine and Discipline, &c., by the Bishop of Melipotamus, Vol. I. p. 116.



still but a Part. If it shares not in the Life of the other Portions of the Frame, it dies. Now, the Life of Anglo-Saxon Society was its Law.

I have disclaimed the Intention of entering into any Investigation of the Anglo-Saxon Forms of Judicial Procedure. But there is something so powerful in the Illustration which the general Polity of our Forefathers derives from the Particulars of their legal Process, that I cannot hesitate to bring some of them under your Notice.

In Suits between Man and Man, the "Namium" or Distress was the First Process, by which the Defendant was compelled to appear. The Statutes of Knut the Great, by which this Process was regulated, did not create the Remedy of Distress, which subsisted long before that Period; being Part indeed of the general Law of Reprisal, and, as such, of the Code of every Nation, as well as of the great International Code by which the Relations of them all reciprocally are to be determined. The Laws of Knut, however, by regulating the Process, prevented any Abuse of it. Before the Distress could be levied, the Defendant must have been Thrice summoned to submit to the Judgment of the Court of his Hundred; a Fourth Day of Appearance was then to be appointed by the Court of the Shire; and, then only, if the Defendant continued contumacious, was the Complainant permitted to avail himself of his Common Law Right of Distrainment (*t*). Later still, the King's Court alone was empowered to enforce the Subject's Right; and the Execution of the Process was entirely taken from his Hands. Hence came into Existence the Writ of Distringas, now in common Use, with the preceding Writ of Summons on which it is grounded. I need not remind you of the still more familiar Instance of the Landlord's Power of distraining for Rent, which is derived from the same Anglo-Saxon Source. For until the

(*t*) Knut II. sec. 18; Will. Conq. sec. 43.

Common Law was greatly altered by very Modern Acts of Parliament (*u*), the Distress was taken, as in Anglo-Saxon Times, only as a Pledge or Security for the due Performance of the Rent Service.

Sir Francis Palgrave; with equal Strength and Truth observes (*x*): "The summary Power of Sale now exercised has been created by the recent Statute Law, with more Attention to the Rights of the Rich than to the Rights which were secured to the Poor by our Antient Jurisprudence." There are few Modern Statutes of which precisely the same may not be said.

In Cases of Homicide, the Kinsman of the Slain was allowed by the Angle-Saxon Law to raise the deadly Feud against the Slayer. The private Quarrel became that of the Tribe or Sept, to which the Parties respectively belonged, and the Vassal followed the Fortunes of his Lord. It is a Mistake to suppose that the Clan is essentially a Keltic Institution. It existed amongst the Teutons as amongst the Kelts;—in the Forests of Germany, as in the Island of North Britain; and, in the Affghan and Circassian Tribes of the Nineteenth Century, we may recognise the Patriarchal Institutions of the Scots, and Picts, and Saxons, of the Fifth.

After our Forefathers had founded their Octarchy, the Ties of Tribe and Family continued to be the chief Strength of their Territorial Jurisdictions. In the learned History of the Rise and Progress of the English Commonwealth,—a Work to which I cannot too frequently urge your Attention,—you will find the abundant and important Evidences of the Truth of this Assertion, which my Time will not permit me to demonstrate.

(*u*) 2 Will and M. c. 5; 8 Ann, c. 14; 4. Geo. II. c. 29; 11 Geo. II. c. 19.

(*x*) I. Rise and Progress, p. 182.

The Sept or Tribe of the aggrieved Party enforced, by Retaliation, the Satisfaction due to the Wrong. The Sept or Tribe of the Aggressor were his Security against unjust or excessive Pursuit. But, if either Party were destitute of the Strength adequate to the Protection of his Rights, the territorial Jurisdiction was bound to interfere; and the Shire, in the Person of the Ealdorman, or, if necessary, the Confederation in the Person of the King, would be required to support from the common Stock the Weakness of their Suppliant.

In the Criminal Jurisprudence, therefore, of the Anglo-Saxons, the Feud answered to the Distress in their Civil Suits. Both the one and the other belonged to the same great Natural Law of Reprisal, the only Method by which even to-day Justice is obtained in extraordinary Cases, which the Municipal Law cannot reach. "If the Goods and Merchandise of our Merchants are seized by any other Nation, and spoiled and wasted by them, then we may seize all the Goods of their Merchants, which are in this Realm, until that Satisfaction be made for the Injury. And of this is a Notable Record in 3 Edw. I. m. 19. And the Record saith, that it is *Secundum Legem Mercatorum, et Consuetudinem Regni*." Sir Henry Mountague (Chief Justice). "True it is; and it is like to the Prisal of Goods, *per Withernam*, until Restitution of the Goods be made to be replevied" (y).

The Laws of Knut the Great interposed Securities for the due Regulation of the Distress;—those of Alfred (z) endeavoured, by prescribing short Times of Truce, and imposing Penalties upon the Pursuit of the Guiltless, to mitigate the Severity of the Feud. But these Precautions against the Abuse were not intended to prevent the due Exercise of either Form of lawful Reprisal. It has been

(y) The King v. Cusacke, 2 Roll. R. pp. 113, 114.

(z) Alfred, Sects. 26, 38.

well said, that the Power given to the Conservators of Magna Carta, of compelling King John to observe its Provisions, by attaching and distraining his Possessions, was, perhaps, less derogatory to his Ideas of Royal Dignity, than a formal Submission to the Supreme Council of the Realm. Much more natural would that Power have appeared to an Anglo-Saxon before the Conquest. Between Nations, Reprisals, as well as Wars, are the ordinary Modes of obtaining Justice, where the Want of a common Jurisdiction allows no other.

The English Commonwealth, whether in the Days of Alfred the Great, or in the Days of John, or in our own Days, is to be considered only as a Confederated Union, under One Government, of Jurisdictions originally independent. But, under John, and still more under Alfred, the Memory of local Independence was green in the Souls of the People; and the living Letter of Tradition was Law to all the Land. We, their Descendants, have ceased to value what we have ceased to understand. Like Gallio, now we care for none of those Things. Should the People of this Country ever regain a Sense,—though it be ever so faint,—of what their Forefathers were, and what they are become, they will the more easily comprehend the Law of Reprisals which existed in the Anglo-Confederation;—a Law which was the pervading Spirit of their Polity; and of which the Feud and the Distress were but Two amongst many Examples. The Responsibility of the Members is the Foundation of the Commonwealth. At every Period of its History, anterior to that of Decline, every Measure tended to enforce that Responsibility, and to compel those Members to exercise their own Powers, under the Sense of the Obedience which they owed to the Commonwealth. The Tendency of the Modern Action upon the Antient Law, has been, not to enforce the Responsibility, but to supersede it altogether,—on the One Hand, by depriving

the Members of the necessary Power for discharging the Responsibility, and, on the other Hand, by transferring those Powers to the Supreme Legislature of the Confederation;—a Body, in whose Supremacy the very Notion of Responsibility is lost and destroyed.

The most obvious Responsibility is also the most antient, that of Kindred. The Chief of the Clan answered for every one of the Clansmen composing it, when charged with any Crime. Such was the Law of the Kelts,—a Law which it required not the Statute of Queen Elizabeth to confirm (*a*). Such was the Law of the early Teutons. Under the Anglo-Saxons, a less Patriarchal Polity prevailed. But the Responsibility of the “Maegth,” or Kindred, with them was substituted for that of the Chief. These discharged the legal Fines of their Kinsman, or in default surrendered him into Slavery (*b*).

The Thief, convicted of a First Offence, was committed to the Custody of his Kindred, who thus became the Pledges for his future good Conduct (*c*). If One, who had no Lord, and was “landless,” was received or harboured by his Sept, the latter were bound, upon his committing a Crime, to render him to Justice, or to make full Compensation for the Crime, if he absconded from Pursuit (*d*). Nor was this an unreasonable Responsibility. The strict Reciprocity of Anglo-Saxon Law entitled the “Maegth” to a Share of the Blood Fine, if their Kinsman died by Violence (*e*). These were the most ordinary Incidents of Clanship. The Community could neither evade the Obliga-

(*a*) 11-Eliz. Cap. 4; Irish Acts; Spenser's View of the State of Ireland.

(*b*) Edward the Elder, Sect. 9.

(*c*) Athelstane, Sect. 1.

(*d*) Athelstane, 58.

(*e*) I. Rise and Progress, p. 184.

tions, nor forfeit the Advantages which that Relation conferred.

There is not a primitive People in the World whose Laws and Institutions do not, in this Respect, as in so many others, closely correspond with those of the Anglo-Saxon Race. Sir Francis Palgrave, to whose learned Work I must again refer you for them, enumerates many Examples of such. But One, with which that learned Author appears to have been unacquainted, may be mentioned here. It is found in the Laws and Customs of the Nations of the Western Coast of Africa; and, for the following Description of them, I am indebted to the Industry and Kindness of a Gentleman of high Standing in the African Trade. I should add, that it is almost entirely drawn from European Authorities,—more disposed to depreciate than to flatter the Institutions of the African or any other primitive Race. But, keeping in View the Principles on which we have been dwelling, I trust that you will appreciate their Excellence.

In his Description of the Gold Coast of Guinea (I quote from the English Translation published in 1705), Bosman, the Dutch Writer, after describing the African Process of Litigation, says (f):—

“ It sometimes falls out, that the Plaintiff, or perhaps the Defendant, finding the Cause given against him, contrary to Reason, is too impatient to wait for an Opportunity of having Justice done him, but makes use of the first favourable One, for seizing such a Quantity of Gold or Goods as is likely to repair his Damage, not only from his Adversary or Debtor, but the First which falls in his Way; if at least he does but live in the same City or Village; and, what he has thus possessed himself of, he will not redeliver, till he receive plenary Satisfaction, and is at Peace with his Adversary, or is obliged to it by Force. If he

(f) Pp. 166, 178, 179.

be strong enough to defend himself and his Capture, he is sure to keep it, and thereby engage a Third Person in the Suit, on Account of the Seizure of his Effects for Security; who hath his Remedy on the Person on whose Account he hath suffered this Damage. So that hence proceed frequent Murders; and sometimes Wars are thereby occasioned.

“The firmest Peace of Neighbouring Nations is frequently broken in the following Manner:—One of the leading Men in One Country hath Money owing to him from a Person in an adjacent Country, which he is not so speedily paid as he desires. He causes as many Goods, Freemen, or Slaves, to be seized, by Violence and Rapine, in the Country where his Debtor lives, as will richly pay him. The Men so seized he claps in Irons, and, if not redeemed, sells them, in Order to raise Money for the Payment of the Debt. If the Debtor be an honest Man, and the Debt just, he immediately endeavours, by the Satisfaction of his Creditors, to free his Countrymen; or, if their Relations are powerful enough, they will force him to it. But, when the Debt is disputable, or the Debtor unwilling to pay it, he is sure to represent the Creditor among his own Countrymen as an unjust Man, who hath treated him in this Manner, contrary to all Right, and that he is not at all indebted to him. If he so far prevails upon his Countrymen that they believe him, he endeavours to make some of the other Land Prisoners by Way of Reprisal; after which they consequently arm on both Sides, and watch all Opportunity of surprising each other.”

The next Extract is from Atkins, an English Writer; whose “Voyage to Guinea, Brazil, and the West Indies,” was published in 1737. He writes thus of the Tribes who at that Time possessed, on the same Coast, the Territory

now comprised within the modern Settlement of Sierra Leone (*g*).

“Panyarring is a Term used for Man-stealing (*h*), along the whole Coast. Here it is used also for stealing anything else ; and, by Custom, (their Law,) every Man has a Right to seize of another, at any Conveniency, so much as he can prove himself afterwards at the Palaver Court to have been defrauded of, by any Body in the same Place he was cheated.” “For, if any of our Ships of Bristol or Liverpool play Tricks,” he is writing of the Guinea Trade, (p. 151,) “and, under Pretence of Traffic, seize and carry away such of them as come on Board, and trust themselves with that Confidence, the Friends and Relations never fail, with the First Opportunity, to revenge it. They never consider the Innocence of who comes next ; but, as Relations in Color, Panyarr the Boats’ Crews who trust themselves foolishly on Shore ; and, now and then, by dissembling a Friendship, have come on Board, surprised, and murdered a whole Ship’s Company.”

Smith, in his “New Voyage to Guinea,” (1744,) mentions, (page 101,) a Mate of a Merchant Ship ; “who was Panyarred by the Natives of Cape Mount, about Three Weeks before, and detained there, to make Reprisals for some of their Men, who had been formerly

(*g*) P. 55.

(*h*) On this Passage, my esteemed Friend remarks, that “Atkins is wrong when he restricts the meaning of ‘Panyarring’ to ‘Man-stealing.’ The Word denotes the Seizure of any Object, as a Pledge or Security for the Performance of Justice towards the Seizor. It is the Portuguese ‘Penhor,’ pronounced *Panyor*. But this foreign Appellation does not show the Custom to be foreign, more than does the Portuguese ‘Palavra,’ (Word), corrupted into *Palaver*, prove that the wordy Contests of the Africans were introduced by Europeans.”



Panyarred by some English Ship, as she traded down the Coast ; a Custom too often used."

Mr. Forster, the Gentleman to whom I am indebted for these Extracts, enables me to add, that the Custom to which they relate prevails at this Day upon the Western Coasts of Africa, as it did when the Narratives were penned. "Every Book of Travels," he says, "will furnish you with Instances of 'Panyarring.' It constitutes the whole Code of Negro Policy. And, simple as it is, the Principle enables the Africans to judge sufficiently of the Injustice, which they too often suffer, from Government Officers and Naval Officers."

I wish to be impartial in my Quotations ; and I shall therefore give you what Mr. Mac-Gregor Laird, a very recent Writer, says on this Subject. In his "Expedition into Africa and the Niger," published in 1837 (i), he mentions a singular Instance of the Abuse of this Law or Custom, which, he says, occurred upon the Niger :—

"I learned that the Ibbods Natives had attended the last Ivory Market, being the First they have for nearly Two Moons ; in Consequence of a War between them and the Natives of a Town near Cuttam Curaffee, which arose from a Dispute between a Pulla Boy and One of the Ibbods People. The Boy had bought some Spice Balls from a Woman, at the Town near Cuttam Curaffee, and would not pay the Price for them ; on which the Husband of the Woman who sold them determined to be revenged. For which Purpose, he assembled some of his Friends, and, on the Ibbods Canoes coming down, attacked them, and killed Two of the People. Thus a War commenced, and promised to last some Time ;—several Lives had been lost ;—and all in Consequence of a Dispute about Four Cowries—Four Shells !"

The Facts may have been as stated. Even the Simpli-

(i) Vol. II. p. 255, Mr. Oldfield's Journal.

city of a primitive People will sometimes yield up its Shrewdness to the Absurdities of Passion. In that one Instance some Abuse did perhaps take Place. "But," to borrow an excellent Observation from Burke (*k*), "God forbid we should pass Judgment upon People, who framed their Laws and Institutions prior to our Insect Origin of Yesterday!" The laudable Exercise, and not the possible Abuse, is that alone which claims the Sanction of the Custom; nor can Possibility of Abuse derogate from Custom.

I must, however, guard myself against lending a hasty Credit to the Story. It is plain that the Narrator is not sufficiently free from the mental Confusion of the Epoch, accurately to discern and to estimate the Thoughts and Deeds of simpler Men. He lays Stress, for Instance, upon the trivial Value of the Debt. As if that could be, for one Moment, considered, in any Judicial Controversy,—even in Christendom,—whether litigated by the ordinary Process between Man and Man, as prescribed by the Municipal Law, or by the more solemn Procedure to which Nations have Recourse, for vindicating against each other the Rights of their conflicting Citizens! I will not remind you of that trite Example to the contrary—Hampden, and the Case of Ship-Money; for it is among the Household Words of your Constitutional Annals. The meanest Circumstance may be the Occasion of Consequences the most tremendous. I believe that the lightest of venial Offences may be drawn into Sins the most deadly.

I should here add, that the excellent Gentleman, to whom I am indebted for the above curious Passages from African Law, completes the Information so afforded, by assuring me, on his own personal Observation,—made while visiting those Coasts,—as well as on his Experience as a

(*k*) Speech on Hastings' Impeachment; Third Day. Works, Vol. VII. p. 55. (American Edition.)

Merchant, that, on the Custom in Question, all the Trade carried on by us with the Tribes of Western Africa is based. He added, that, if our Traders do occasionally suffer Inconvenience and Loss, by being obliged to make good the Defaults or Debts incurred by former Traders under the British Flag, and,—whether through Dishonesty, or Insolvency, or Death,—left unsatisfied, they also reap the advantage of having, in the King and Council, or “Palaver” of the Nation, an ever-present and effectual Guarantee for the Solvency of the Native Consignee, and the punctual Performance of his Engagements. I have no small Satisfaction, in being able to quote this independent and disinterested Testimony to the equal and practical Working, even in the Nineteenth Century, and where English Habits and Interests are concerned, of One of the Institutions of the Anglo-Saxon Time.

Like the Jurisdictions of the Antient Britons, those of the Anglo-Saxons were derived from Two Original Sources, Clanship and Territory; and the State availed itself of the Security afforded by both. Besides the Liability of the “Maegth,” the Anglo-Saxon Law recognised that of the District. The “Murdrum” is a familiar Illustration. It was the Amerciament imposed upon a Township, if any One, not being an Englishman, was slain within its Precincts, and the Slayer could not be discovered.

By the Laws of the Hindùs, the Traveller, with or without Merchandise, became the immediate Care of the Government, which, at its own Cost, fed and lodged him—allowed him Carriage—and gave him Guards to accompany him from Stage to Stage, and to be made accountable for the Safety of his Person and Effects (*l*). In like Manner, amongst

(*l*) Mr. Holwell’s Account, *apud* Burke’s Speech on Hastings’ Impeachment; Third Day, 15th February, 1788. Vol. VII. of his Works, p. 57. (American Edition.)

our Anglo-Saxon Forefathers, a benign Custom placed the Stranger under the "Mund," or immediate Safeguard of the King. In that Capacity, the Monarch became entitled, upon such a Casualty, to a considerable Share of the "Were," or "Blood Fine," incurred by the Township (*l*). So, too, where the "Spor," or Hoofmarks, of the stolen Kine of the Pursuer could be tracked into another District, the Inhabitants were bound to pay the Value, or to show the Track by which the Beasts had passed out again;—a Law, says Palgrave, which prevailed between Township and Township—between Hundred and Hundred—and between Nation and Nation;—and of which the Devonian Compact, made between the Britons and Anglo-Saxons of either Side of Exe, is a very celebrated Example (*m*). In the Scottish Highlands it was retained, without Alteration, from Time immemorial. It is found in Southern Africa, where the Disputes of the Europeans and Kaffres of the British Border are by it at this Day determined. Doubtless it is to this Law, and the Precaution it inspired, that the Pains and Penalties annexed to the Breach of the Regulations of the Market,—current within every Township,—touching the Sale and Purchase of Cattle, owed their Birth (*n*).

The celebrated Law of Frankpledge had no other Origin. Of uncertain Antiquity,—this much is certain; that it was not, as some have supposed, the Cause, but the Consequence, of that collective System of Responsibility, by which the Commonwealth of England has been so honourably and deservedly distinguished. The Frankpledge was only a better Choice of Means, for enforcing the subsisting Responsibility of Family, Sept, and Township. It was of Two Kinds—Seignorial and Collective. In the First, the Lord was the permanent "Borh," or "Pledge," for the Appear-

(*l*) I. Rise and Progress, pp. 185—6.

(*m*) *Ib.* p. 187.

(*n*) *Ib.* pp. 189—90.

ance of his Vassal, Retainer, or Inmate;—the “Manupast” of his Roof and Board, whom he was bound to produce in Justice whenever required, or to be liable for his legal Forfeiture (*o*). In the Second,—which consisted of Associations composed of “Ceorls,” or “Villains,” exclusively,—the Members of the Associations of the Saxon Era were of unequal Extent, according to the Custom of the Country. But, the smallest Number of which they could be composed being Ten, they were called Tythings. Priests were exempted.. But every Layman, who was not possessed of a specific Amount of Freehold Property, was bound by Law to enrol himself in the Collective Freeborh, or under the Freeborh of his natural liege Lord (*p*); and, unless so enrolled, none above the Age of Twelve Years, and not having the temporary Excuse of Itinerancy, could be received into any Township. Thus constituted, the Frankpledge—Seignorial and Collective—were the Soldiers and Constables of the Anglo-Saxons;—for there were then no paid Police, no standing Army; and the illegal and absurd Distinction between Soldier and Citizen had not suggested itself to the noble Simplicity of their Minds. Watch and Ward, on the King’s Highway or “Street,” were performed by the “Ward Reeve,” and the “Four Men” from every “Hide” of the “Hundred.” The Ward Reeve, like the Thannadars of the antient Hindù Villages, held his Lands Tax-free; and, in Return, was personally liable to Fine, if, by his Negligence, the Robber escaped with the Prey (*q*). Under him each Man of the Township performed Military Service in his Turn. At every “View,” or Assembly, of Frankpledge, the “Hyld Oath,” or Oath of Allegiance, was taken by the Members, according to

(*o*) Knut. II. Sec. 28; Plac. Coronæ. 10. Ric. I. m. 1.

(*p*) Edgar II. Sec. 6; Edgar III. Sec. 1.

(*q*) I. Rise and Progress, p. 200.

their respective Tythings. In every Respect, those Bodies, created by the Act of Law, served to replace the expiring Septs of Consanguinity.

The Collective Frankpledge, although general throughout England, was not universal there. Into Shropshire, Northumberland, and some Boroughs of Mercia,—amongst which Bristol and Worcester are particularly mentioned,—it was not introduced. But the Collective Responsibility within these Jurisdictions subsisted, no less than elsewhere; the only Difference being, that there the Township and the Borough incurred the Liability, which otherwise would have been attached to the Tything. This, indeed, was the general Law for all the Districts of England, whether they had View of Frankpledge or not. The Township was amerced, which had harboured any “Resiant,” not enrolled in some Frankpledge, and who could not show himself entitled to Exemption. “I know not,” says Sir William Temple (r), “whether any Constitution of Government, either antient or modern, ever invented or instituted any Law or Order, of greater Wisdom or of greater Force, to preserve the Peace and Safety of any State, and of equal Utility to the Prince and People; making Virtue and Innocence of Life so necessary, by the easy Apprehension, or Discovery, and certain Punishment, of Offenders.”

I have said that the Anglo-Saxon Empire was a Federation of States. Many of these were Vassal States, which had once been Sovereign and Independent Members of the Octarchy; and these retained every One of their Rights, except those of Sovereignty, after the Realms had consolidated themselves under One Sceptre. Others again were smaller Communities; always subordinate, yet always free:

(r) Introduction to the History of England, Vol. III. p. 183. (London, 1770.)

fully acknowledging the Imperial Supremacy,—but, for all local,—and likewise all administrative,—Purposes, acting as it were independently, alike of the Imperial Government, as of the inferior State or Principality, within whose geographical Limits they happened to be situate. Over all these Confederate Estates, of so many and such various Degrees of Rank and Importance, presided the mighty “Basileus,” and, around His sacred Person, stood the “Witenagemot.” To Him were assigned the Functions alike of War and of Peace. He administered Justice in last Resort. He made new Laws, that should bind the whole Confederation. He was the sole Depositary of the Power of the Sword; and He led their Array to Battle. All these were Imperial Functions; and, with Imperial Titles, He claimed and exercised them. But there were Bounds to that Exercise. The “Witenagemot” were the “Proceres” of the Empire, and, in that Capacity, had a Right to be in every Case consulted. Every “Folkmoot,” whether it were that of the “Earldom,” the “Shire,” or the “Hundred,” was, in like Manner, the Assembly of the “Proceres,” of their Jurisdictions, and,—within those Limits,—possessed all the Rights and Functions which the “Witenagemot” possessed in Respect of the entire Confederation. It was true that neither His Imperial nor His Provincial Councillors could supersede His Office, by taking the Initiative;—in Legislation or Diplomacy; in levying War; or in contracting Alliances. Like the Frankish Emperor, His Discretion might always withhold the Measure from Examination by withdrawing it. This was the Original Sense of the much-dreaded Word “Prerogative.” That terrible Word, derived from the Verb “prærogare,” signified, as well in Letter as in Substance, the Right of initiating the Measures of the Executive, and the Processes of Law and Justice. It

had no other Interpretation (*s*). But, if the Monarch so withheld the Ordinance from the Examination of the constituted Estates, or "Proceres," whether of the Empire or of the Province, the Ordinance could not be enforced (*t*). It was, in short, the Prerogative of the Basileus to stand still and be idle, if He declined to seek the Concurrence of His "Wissenden." But move without it He could not!

The Constitution of every "Gemot" was much the same. They were assembled for all Kinds of Purposes. In After-Times, the Anglo-Norman Prince summoned His Lieges in like manner for various Ends; but always as Members of His Great Council or Parliament. But, in the Annals of those later Sovereigns, as in those of their Anglo-Saxon Predecessors, we read of "Conferences," "Councils," "Armed Councils," "Judicial Councils," "Councils of State," and the like;—yet the same Sovereign convoked, and the same "Wise Men," and "Proceres," sate in all of them (*u*). In like Manner, every dependent State or Principality of the Anglo-Saxon Commonwealth had its "Witenagemot;" in no Respect differing from that transcendent One, which deliberated around the Basileus,—save in the comparatively slender Attendance of its Members, and the Inferiority of their political Importance. Descending to those lower Jurisdictions, the "Shire Court," and the "Hundred Court," we witness none, among their Functionaries, that do not also appear in the august Assemblies of the "Witan." The Inferiority of the "Gemot" is marked by the Absence of the more

(*s*) The Tablet, Vol. IV. p. 51.

(*t*) Rise and Progress, &c. Vol. I. pp. 540, 552, 633, &c.

(*u*) Rishanger, pp. 14—64.



illustrious "Proceres,"—not by the Substitution of others in their Place.

The "Township," as I have observed, was the Element, the indivisible Unit or Integer, of the Anglo-Saxon Body Politic. It was the Seignior of the Lord; to whose Jurisdiction, however, the Concurrence of the Inhabitancy, as represented by a certain Number of "Sokemen," was essential (*x*). An Officer, called the "Gerefa," or "Reeve," was the indispensable Appendage to every Township. In that Township (unlike the illustrious "Graf," or "Comes," from whom his Appellation was originally derived), he was but the Governor of the "Ceorls," or "Churls," (the Villein Class of "Freemen,") and the Fiscal Officer of their Lord. But, at every "Gemot,"—from the august "Witenagemot" down to the "Hundred Court," within whose Jurisdiction his Township lay—the Reeve appeared in a somewhat higher Character. He came to those Assemblies as the Deputation of his Township, representing in that Capacity the Lord himself. He spoke and acted on his Lord's Behalf, and gave such Testimony as would have been given by that Nobleman. Yet he was not his Nominee. He was chosen by the Men of the Township, through the Presentment of their "Jury of the Leet,"—not nominated by their Lord;—and, when he went to represent them in the "Gemot," he was always accompanied by the "Four Men," who were likewise elected for that Purpose, and whose Presence was equally indispensable with his own. With them also came the "Mass Priest," or Curate of the Township;—for, before the Conquest, the Clergy were not afraid to trust themselves in Courts of secular Authority (*y*).

(*x*) Domesday, p. 193 (*b*).

(*y*) Etheldred, Sec. 1; Knut II. Sec. 20, 27; Henry I. Sec. 7.

The next Jurisdiction to the Township, in Order of Rank, was the Hundred. Antiquaries are divided as to the Etymology. The "Centena" of Tacitus; the "Cantred" of the Welsh Britons; the Scandinavian "Hœrred;" have all found their Partisans, according as the Hundred has been supposed to mean a Hundred of "Tythings," of "Hydes," of "Freemen," or of "Free Families" (z). But, whatever the Etymology, the Term itself was universally known throughout England, South of the Trent. To the North of that River, the Ceremony of the Spear, used at the Installation of the "Earldonnan," or "Earl," (as Sir Francis Palgrave supposes,)—or, perhaps, the Musters of the Armed Array which took Place in every Hundred,—gave to the territorial Division the local Designation of "Wapentake."

The Hundred Court was held every Month. It consisted of the Bishop of the Diocess, the Alderman (who, as the "Missus," or Representative of Royalty, always presided with the Bishop), the "Thanes," and "Landlords" of the Hundred, and, as before noticed, the Priest, the Reeve, and the Four Men of each of the Townships. The Powers of this Great Court were usually, for Convenience' Sake, exercised by a Select Committee of their Number;—commonly by Twelve, but sometimes by Twenty-four, and even Thirty-six (a). In them the highest Branches of Jurisdiction were vested; in Criminal Jurisprudence, alike as in Legislative Proceedings; and, by their Means, the Taxes were assessed upon, and gathered from the Hundredors (b); an Usage, which has been remarked, by Mr. Urquhart, in the Turkish Municipalities of the present

(z) Rise and Progress, &c. Vol. I. pp. 96, 7.

(a) Henry I. Sec. 7; Ethelred II. Sec. 8; Hist. Rams. p. 415.

(b) Ll. of North. Clergy, p. 101.

Day (c). The Government of the "Lathe," or "Hundred" of Romney, according to Palgrave, is the last Vestige of the System in England. "With some Changes," he says, "it has been perpetuated to the present Day; and, in the antient Jury of Twenty-Four, whose Presentment, confirmed by the "Lords" of "Fees," and the "Reeves," or "Propositi," of such as were absent, became the Laws by which it is governed, we may discover the "Thanes" of the Saxon Age (d)."

Coming next to the "Shire Court," we perceive, in that more important Jurisdiction, only an amplified Copy of that of the Hundred. There were, indeed, Two Classes of Shires, and the Scheme of their respective Courts was accordingly far from uniform.

In the One Class, the Shires may be said, according to Sir F. Palgrave (e), to have been originally British or Anglo-Saxon Royalties, mediatised at Length into Provincial States. In the other Class, the Shires were formed by dismembering Kingdoms, and placing their loosened Elements under the separate Rule of "Earls," or "Aldermen." In the former Class, it is obvious that the Shire Court possessed much greater political Influence than it had in the latter. But that was but a Difference of Degree, which did not affect the Principle common to both.

The Shire Court was to be held at least Twice a Year (f). The Bishop and the "Alderman," or "Earl," presided, and declared respectively the Ecclesiastical and the Municipal Law. The "Scyr-Gerefa," or "Shire Reeve," (Sheriff,) the "Landlords" of the Shire, (either in Person, or as

(c) Urquhart's "Turkey and its Resources," p. 443. (London, 1833.)

(d) Rise and Progress, &c. Vol. I. p. 102.

(e) *Ib.* p. 116.

(f) Edgar I. Sec. 5; Knut. II. Sec. 17.

represented by their own "Reeves,")—"Twelve Jurors" from every "Hundred," (those Successors of the "Scabini,")—the same Number of Deputies from every "Burgh," and every "Demesne Crown Manor;"—and, lastly, (but unsummoned,) the "Four Men, and Reeve," from every "Township," came to that Assembly and completed it (*g*). Here were determined the Pleas of the Crown, the Public Peace avenged, the Rights of the Church asserted, and the Wrongs of the People redressed. Civil and Fiscal Transactions of all Kinds were concluded in the Shire Court; both in Concurrence with those of the 'Hundreds, and by Way of Appeal from the latter; and, generally, the Political Relations of the Shire with the Empire, or of the Empire with its Neighbours—in so far as the Rights and Interests of the Shiremen were likely to become compromised through the latter,—were, in that Assembly, considered and adjusted.

The highest of those Assemblies was called "The Witan;" "The Mycel Gethaet," (or "Great Thought,") or more commonly "The Witenagemot." It met Thrice a Year, or oftener, as Need required it. Every great Appanage of the Empire had its own Witenagemot. But the highest among them all was the Imperial One; which was summoned by the Basileus Himself (*h*), who presided in Person. In like Manner, that of the Appanage was summoned by its Alderman, with the Leave of the Basileus (*i*). Every Witenagemot was composed of the following Members.

The First Order was that of the Prelates. Next came the "Aldermen," or "Earls" and "Seniors," summoned, not only as the Chieftains of Districts, but also as "Vassals," or "Antrustions" of their Sovereign. Then came

\* (*g*) Henric. I. Sec. 7.

(*h*) Saxon Chron. pp. 230, 1010.

(*i*) Rise and Progress, &c. Vol. I. Append. p. cclxxxiii.

the Thanes, as "Landlords," in their several Communities. And, lastly, came the Twelve Jurors of Hundreds, Burghs, and Crown Manors; and the Four Men and Reeves of the Townships came to "listen" to the Promulgation of the Decrees and Edicts of the Sovereign, to "declare" their Grievances, and to "present" the Crimes and Misdemeanours of their respective Jurisdictions (*k*).

But, to the Imperial Witenagemot,—where His Basileus of Albion appeared, reciting the Oath he took at His Coronation, and wearing His Crown, and surrounded by His Great Officers,—there resorted a mightier and more illustrious Senate. Thither, besides the Classes I have enumerated, came the Vassal-Kings of Ireland, Wales, Scotland, and the Isles, to testify their Obedience. It comprehended all the Councillors, and Sages, "Rædesmen," (or Privy Councillors,) and "Witan," both Clerks and Laymen, whose Advice and Assistance the Basileus was entitled to demand. It was, says Sir F. Palgrave, the General Diet, or Placitum of the Empire (*l*).

But the Imperial Witenagemot was also the Witenagemot of Wessex,—the patrimonial Territory of the Basileus. The Recognition of His Title by that Body, upon His Accession, gave Him no Rights over Mercia, and the mediatised Kingdoms of the Octarchy, nor over the unruly People of the Danelaghe. He needed to be proclaimed and inaugurated in every One of those "Land Gemoten," as He had been in that of Wessex. There was but One Coronation,—or Consecration—for the whole Empire. But that was by the Ordinance of the Church which administered the Rite. The Inauguration, being a civil Ceremony, was regulated by the Usages of the Federation (*m*).

(*k*) Henric. I. Sec. 7; Rise and Progress, &c. Vol. I. Append. p. cxxii.

(*l*) I. Rise and Progress, p. 636. (*m*) *Id.* App. p. cccxlv.

In like Manner, when new Laws were to be made for the Empire, these had no Validity, beyond the Confines of Wessex ; until the Land-Gemoten of the dependent Kingdoms or Provinces had solemnly accepted them on Behalf of their respective Peoples. Sir Francis Palgrave enumerates Laws, which, notwithstanding the explicit and lofty Language in which they were enacted, did not obtain the Recognition and the Assent of the inferior Witans, for more than a Century in some Cases, and in others not at all (*n*). In Wessex itself they acquired legal Validity, without further Promulgation ; for the "West Saxon" Witenagemot was included in that of the Empire.

The Members of the Witenagemot were the "Pares Curie" of the State. The Charters, which the Sovereign gave, were given in their Presence, and with their Concurrence as attested by their Subscriptions. They decided Controversies among Crown Vassals, and, indeed, among all Classes of the Community. They annulled the Royal Edict, when contrary to Law and Justice (*o*). They possessed, concurrently with the Shire and Hundred Courts, a Jurisdiction in all Matters of Civil, Criminal, and Fiscal Regulation ;— but they also exercised an Appellate Jurisdiction over these ; and, finally, an Original Jurisdiction which transcended all others. Legislation, as I have observed already, was but a small Branch of the Duties of the Witenagemot. The People were *then* too wise to demand new Laws for the Novelty's Sake, and too well satisfied with their Birthright to abandon it.

Upon general Questions, the Authority of the Witenagemot has been not inaptly likened to that of a modern Political Congress, summoned upon an Emergency (*p*).

(*n*) Rise and Progress, Vol. I. pp. 638, 9, 643.

(*o*) Hem. p. 27.

(*p*) Rise and Progress, Vol. I. p. 641.

The Sovereign assembled His Vassals and Liegemen, to *treat with* them touching the common Danger,—to receive their honest Admonition and Advice,—and to *ask* them to co-operate. It appears, in Fact, that, at those Congresses, the Vote of the Majority did not bind any One Member of the Empire to the Political Measure decided on, unless he himself had concurred in it. Thus, the “Under-King” of Cumberland, who stood out against the Grant of Danegelt, was not affected by the Vote, and, as he lawfully might, refused to obey it (*q*).

No Charter was ever sealed, no Decree ever made, no Law ever declared, no Proclamation ever issued, by the Sovereign,—save only in full Witenagemot, and with their Concurrence, whose Names were carefully entered of Record upon the Roll. The Charters of Alfred the Great (*r*) exhibit the singular Importance which that Monarch attached to such Attestations. He “*charges* his Lieges to *witness* what He is doing for the Confirmation thereof.” He “beseeches them, whose Names follow His own, to consent and subscribe at His Prayer, and for His Love.” Occasionally, in after-Times, Force itself does not seem to have been spared to obtain Subscriptions (*s*). But those Formalities of Detail were but idle,—those Precautions superfluous,—that Unwillingness of the “Testes” utterly unaccountable,—unless it were true, that the Act of the Monarch, although supported by a Majority of Voices, did not bind those Counsellors who stood out against it. On the other Hand, it is quite clear, from the whole Course of the Argument, in the famous Question between the Bishop of Chichester and the Monks of

(*q*) Scotichronic. IV. 38 ; Baron. Annal. pp. 116, 17 ; Chronicon Will. de Rishanger, p. 65.

(*r*) Cod. Diplom. Anglo.Sax. (curâ Kemble) Vol. II. pp. 126, 130.

(*s*) Chronic. Will. de Rishanger, p. 3.

Battle, that a Charter,—although granted by the King Himself, and confirmed in the Great Council,—could not, even in Norman Times, affect the Rights of an inferior Jurisdiction, where the Officer who represented the latter for the Time being, had not subscribed *his* Name as One of the “Testes” to the granting it (*t*).

The Frequency of those Assemblies, and the Facility of calling them together, might have seemed to preclude the Necessity of a Standing Council of State. They were competent to the Discharge of the most tedious and delicate Functions, no less than of those which demanded steady Consideration and instant Resolve. Their collective Weight and Influence, representing, when assembled, every Class in the Empire, from the Scottish and Welsh Princes, down to the Churl of an English Township, pointed out the Moot-hall where they sate as the Spot most eminently adapted for the latter. The former would be left to the more able and diplomatic among the “Proceres.” As in the Shire Court, so in every Gemot, it was the Practice, when Occasion called for such a Measure, to choose by Lot, from among the more influential Members present, a Select Duodenary Body of Men, and to delegate to those, not only the Business before them, but also all the Powers and Authorities which the Gemot itself might have used in transacting it. I have already remarked upon the interesting Fact, presented in the Records of the Shire Courts, that the respective Numbers of those Committees varied sometimes; but that, when they did, it was from Twelve to Twenty-Four, and from thence to Thirty-Six, that is to say, in Duodenary Proportion.

It is scarcely necessary to remind you of the Duodenary Constitution of the Courts, which, from the Days of your Saxon Forefathers, have administered the public Justice of

(*t*) Rise and Progress, &c. Vol. I. Append. p. 34, &c.



this Realm. But the Practice was far more antient, nor was it confined to England. We meet with it everywhere, and at all Times of the World's History. Woden, the Founder of our Race, brought it with Him, out of Asia, into the North of Europe. "In Sigtun City," says the Edda (u), "Odin made XII. Princes, after the Manner of Troy, to defend the Laws and to dispense Judgments, according to the Turkish Usages." Sheringham, commenting upon this remarkable Passage, suggests, that "hence that never-to-be sufficiently admired Custom took Root amongst us, by which the whole Power of decreeing of Right, and despatching of Law Suits, is given unto Twelve Sworn Men, whom therefore in our hereditary Speech we term 'a Jurie.'" "From the earliest Times," as was said by Anthony Brown, a Justice of Common Pleas under Elizabeth (x), "it was the Custom that Matters of Fact should be tried by Twelve Men of the Country where the Matter arises, and Matters of Law by Twelve Judges of the Law. For which Purpose (y), there were Six Judges here, and Six in the King's Bench; who, upon Matters of Law, used to assemble together in a certain Place, in order to discuss what the Law was therein."

That the same Reverence for the Sacred Twelve was displayed in the Great Council, which existed everywhere else, we cannot doubt. The Select Courts, or Committees, of the Witenagemot were, in all Probability, of a Duodenary Con-

(u) "Oden Skipade thar Hoffdingium i tha lyking sem vered haffde i Troja, sette Tolff Hofudmen i Stadnum ad Deema Lomdslog og tha Skypade hann Riettum ollum sem fyrr Hoffdu vered i Troja og Tyrkyar voru vaner;" (*apud* Sheringham; "de Anglorum Gentis Origine"; Cap. XII. pp. 235, 237; Annot. p. 272.)

(x) *Willion v. Berkley*, Plowd. C. p. 231.

(y) 1 Finch, pp. 44, 198; 2 Finch, pp. 61—62.

stitution. Such was the Practice of the Great Councils of the Norman Kings, at a Period anterior to the Introduction of the Commons into their Deliberations. We meet with the "Twelve" and the "Twenty-Four" so late as the Reign of the Third Henry. The very Phrase is preserved. They are "in Duodenario Numero Electi" (z).

But there was then a wakeful Jealousy among the Rulers of England, which fitly corresponded with the Zeal and Patriotism of the Citizens. The Witenagemot, indeed, was the greatest of the King's Councils of State; but it was not the only One known to the Law. It has been already noticed, that, in the Witenagemot, the "Councillors," or "Rædesmen," appeared as a Class. These were the ordinary Advisers of the Sovereign. They occur in Chronicles and Charters as "Rædesmen," "Rædigifan," and "Consiliarii" (a). In another Charter, the Rædesman is named under the special Denomination of "Thegn æt Ræde and æt Runan," or "Thane at Council and at Secrecy" (b). Runnimeade, where the Barons extorted from King John the Confirmation of their Liberties, was always, as Sir Francis Palgrave well remarks, the "Field of Private Council" (c). Hemingius furnishes one Proof that the Post of Privy Councillor gave great Consequence to the Thane who filled it. In describing, on Bishop Wulstan's Authority, the Merits and Importance of one Egels, he tells us, that he was "a right noble Man, and a wise One, both in religious and in worldly Businesses, insomuch that he came to be numbered among the King's Councillors, and among them

(z) Chron. Will. de Rishanger, pp. 357, 359.

(a) Sax. Chron. p. 211; Somners, p. 213; Rishanger, *ubi supra*.

(b) Concilia, Vol. I. pp. 283, 284.

(c) Rise and Progress, &c. Vol. I.; App. p. cccxlviii.

became notable enough. Hence it came to pass, that in Wealth, and in Store of Moneys, he did outshine many that were of higher Rank than he was" (d).

It is an important Fact, that the very last Historic Document, in which the Anglo-Saxon Language was used, contained a distinct Recognition of that Class of King's Counsellors, under their old Name of Rædesmen. It was the Writ, or Patent, which King Henry III. sent "into every English Shire, and also into Ireland," in Pursuance of the famous Provisions of Oxford, charging Obedience to those, and also to the further Provisions to be made by Him through "the aforesaid Rædesmen, or the more Part of them;" (the Principle on which the Majority is said to represent the whole Body, having begun, by that Time, but only partially (e), to be understood.) The King mentions that these Rædesmen had been chosen by Himself, "*and by the Landsfolk of the Kingdom;*"—Language significant of the Humiliation to which the Event of War had then reduced Him! (f).

The Language of the Constitution would have been, that the King Himself chose them from out of the Landsfolk, and also "out of the several Parts this State was composed of" (g). But the Functions of the Rædesmen, however selected, are well described in the Writ. They were to "advise and consider" with the Sovereign, "for the Honour of God, and, under their Allegiance to Him, for the Amendment of this Land."

Henry, on His Side, is made to "will and grant, that what they have done, or shall do, in that Wise, shall be steadfast and lasting in all Things, without End," and that, "if any

(d) Hem. p. 277.

(e) Chronicon W. de Rishanger, pp. 3, 13, 37, 65, 123.

(f) Rot. Pat. ; 43 Henry III. m. 15.

(g) Sir W. Temple's Mem. Vol. II. Append.

others come against them, all His liege People them do hold for deadly Foes" (*h*). Here, it is the Monarch that promulgates the new Ordinance, by and with the Advice of His Privy Rædesmen or Counsellors. Such is still the Law of England. Such, doubtless, was also the Law, and moreover the Practice of the Anglo-Saxon Age! Whenever the Witenagemot sat, the Monarch dealt not but with their Concurrence. In their Absence, He had His trusty Rædesmen.

Were we now to pause, and to review what has been already noticed of the Anglo-Saxon Constitution, we should find, at every Point of our Enquiry, some fresh Matter for Admiration. There are those who think it the most perfect Form of Government to be found recorded in the World's Annals. They may be well pardoned for such a Thought.

Of what Consequence is it, that, of the Method of Election, or of the Limitations of the Popular Suffrage, (known to the Anglo-Saxons,) we ourselves know nothing? Surely, of every Popular Constitution which the World ever saw, the Aim was to excite the Popular Attention to the Course of Contemporary Events—to instruct the Popular Mind as to the Causes and Results of those Events,—and to control the evil Inclinations, and to coerce the sluggish Tendencies, of their Servants, by placing in the Hands of the People the Means of making effectual the Knowledge thus acquired. These are the true and only Safeguards of States! Monarchy or Democracy, it matters not,—that State must fall whose People are depraved. Democracy or Monarchy, it matters not,—that is a Strong State, whose People hold, and are determined to retain, the Knowledge of their Affairs,—the

(*h*) Rot. Pat. *ubi supra*. Rishanger observes, that this was the "only" Clause in the Provisions of Oxford which excited Discontent (p. 3). The Doctrine of Majorities could not, as yet, be brooked to that Extent!

Boldness in applying it,—for which the Anglo-Saxons of other Days are honourably distinguished from their Progeny in this.

You will venerate in these Men the Reverence which they paid to the Law. You will respect their jealous and scrupulous Regard for the Franchises of all. You will admire that Symmetry of Structure,—that Political Hierarchy, where Equality of Right was the Groundwork, and Privilege the Ornament;—and, duly impressed with the Spectacle, you will be the better able to guard yourselves hereafter from those, who, decrying the Wisdom and Integrity of your Ancestors, pretend to purchase the greatest Happiness of the greatest Number, at the Cost of the Rights of the Few.

It was surely an unguarded Moment that, in which One of the most fanatical and dishonest of that Class of Sophists—I mean the President Montesquieu—recorded against himself and his Associates in the Work of Destruction, the striking Testimony:—

“The Sea, which appears on the Point of overflowing the Land, is arrested by the Herbage and the smallest Sands that are found upon its Shores. And Monarchs, whose Power seems unbounded, are arrested by the smallest Obstacles, and humble their native Pride before Complaint and Prayer. The English, in Favour of Freedom, have rid themselves of all those Mesne Jurisdictions which had formed their Monarchy. Much Reason have they to maintain that Freedom. If they were to lose it, they would become One of the most enslaved among the Peoples of the Earth. There are those who have imagined the Abolition, in certain States of Europe, of all Seignorial Jurisdictions. They saw not that they were wishing to do that which the English Parliament had done. Abolish in a Monarchy the Prerogatives of the Lords, of the Clergy, of the Gentry,

and of the Boroughs, and you will very soon have a popular Government,—or else a Despotism” (j).

And, I say, abolish the Prerogatives of the Crown; and, sooner or later, the Prerogatives of the Lords, of the Clergy, of the Gentry, and of the Boroughs, will vanish. Abolish the Prerogatives of the Sovereign Pontiff, the Vicar of the King of Kings, and some or all of these inferior Prerogatives will begin to disappear.

Let not this memorable Truth be forgotten or obscured. The Political Rights enjoyed by your renowned Forefathers, and by them transmitted to their Children, and so,—with what Dilapidations, let modern Degeneracy speak,—preserved even to our own Times, were the rich Reward of their own honest Reverence for the personal Rights of each, and the common Duties of all. The Constitution of England sate enthroned within the Palace of Justice. The Political Principles of Anglo-Saxon Patriots were the hoar and Time-honoured Axioms of Anglo-Saxon Law. Their only Political Meetings were their Law Courts. Their only Political Orators were their Judges;—Men, who, with Credit and Reputation, administered to High and Low the pure Blessings of Justice. Their only Political Representatives were their Jurors. Their only Parliament was their Highest Court of Judicature, Civil and Criminal, Original and Appellate.

It was no Code, no Written Constitution, that gave them this Boon. It was theirs from of Old, and by Habit. Their Wont it was to venerate the Laws of their Country, and for the Sake of those their Ministers, whether Magistrates or Jurors, and to attach solemn and sacred and beloved Associations to the Persons of those Ministers, and to the Spots where they and Public Justice sate. That was a Habit which pervaded every Class. From the King to the

(j) *Esprit des Lois*, Vol. I. Liv. II. Chap. IV. pp. 32—5.

Hind it breathed its Influence. With such Dispositions, it was natural that, on the One Hand, the oppressed should resort, for the Redress of their Wrongs, for their Comfort under Suffering, to the Holy Temple of the Law, and to the sacred Personages who sate within the Porch. It was natural that the Intervention of Advocates, such as these, should have been rarely withheld upon such Occasions, and, when employed, that it should in general have proved not unsuccessful.

Had it not been for the constant Exercise of the Functions, which the People of England possessed, when they assisted in the Administration of the Law, *we should not now possess one of our Political Rights*. When no Species of Popular Suffrage existed; and, consequently, when, in the Jargon of Modern Days, the Bulk of the People had no Political Existence;—then, and during the whole of that Period of the Maturity, or, as we call it, the Infancy of Liberty, the Mainspring of the Machinery of remedial Justice existed in the Franchises of the Lower and Lowest Orders of the Political Hierarchy. Without the Suffrage of the Yeoman, the Burgess, and the Churl, the Sovereign could not exercise the most important and most essential Functions of Royalty. From them he received the Power of Life and Death. He could not wield the Sword of Justice, until the Humblest of His Subjects placed the Weapon in His Hands (†).

Think then of these Things. For they are pure and holy, and of good Report, and abounding in Virtue and Praises. Compare them with everything that is passing around you,—with your own Thoughts,—and with the Estimation in which you hold these Things yourselves. Be the Result as favourable as Truth will sanction, it still must justify your worst Forebodings.

(†) *Rise and Progress, &c.* Vol. I. pp. 276, 7.

The illustrious and righteous Eastern King, who founded in India the mighty Empire of the Moguls, and transmitted it to a long Line of Children and Descendants, bequeathed to them a more sacred Legacy, in those admirable Institutes, famous in every Land under the Name of their Compiler,—in every Land where Virtue and Wisdom are in Honour;—and he charged them to make of that priceless Bequest “the Rule of their Conduct,” their “Model,” and “their Means of preserving the Fortune and Power which should descend to them, and the Splendour of his and their Dominions.”

I quote His Words. They have a terrible Application (k).

“Behold! it was known unto me by Experience, that every Empire, which is not established in Morality and Religion, nor strengthened by Regulations and Laws, from that Empire all Order, Grandeur, and Power shall pass away!

“And that Empire may be compared to a naked Man, who, when exposed to View, commandeth the Eye of Modesty to be covered!

“And it is like unto a House, which hath neither Roof nor Gates, nor Defences; into which whosoever willeth may enter unmolested!”

The Beginning is Parent of the End.

To their Sense of Law, to their Love of Justice, our Fathers owed the Freedom, the Happiness, the Ascendancy of England. Unless we retrieve it, that which began gloriously, must perish miserably, amid the Execrations and Insults of surrounding States.

(k) Institutes of Timur.



## LECTURE IV.

## WILLIAM THE CONQUEROR TO EDWARD THE SECOND.

By the Battle of Hastings, William the Norman established His Succession to the Crown, and ended the brief Usurpation of His Competitor. Henceforward the Adherents of Harold were at the Mercy of a Conqueror, who had Enemies to punish, and Followers to reward. To those the Conquest presented itself in the Aspect of the worst and most complete Occupation. Over them, at least, the Conqueror had acquired an absolute Dominion. Their Lands and Chattels were in His Hands; their Rights and Franchises at His Feet. He was the successful Claimant in the great Trial of Battle, which had ended for them so mournfully. The Issue that gave Him the Crown, branded them with the Guilt of Rebellion.

But, to the rest of the Nation, the Change could not have appeared so important. If Harold was a Saxon by Birth, he was One undoubtedly of no Royal Stem; and—whatever the Rights of the able Invader against the irresolute and incapable Atheling—when compared with the Pretensions of the ambitious Son of the low-born and hated Godwin, they were undeniable. If William was a Stranger, so had been Knut, and His Two immediate Successors. If the Northman was only of a Cognate Stock to that of Cerdic, Hewas of closer Kindred to the powerful Tribes of the Danelaghe. He had been the bosom Friend of the Confessor; and, if Fame spoke truly, He had also been, by that revered Prince, pointed out as the fittest Occupant of the now vacant Throne. Nor was that so extraordinary. England and the Duchy were close Neighbours and near Allies. From Nor-

mandy the late King had derived great and timely Succour in His Necessities. His Mother was a Norman Princess. On the other Hand, the Royal Blood of England flowed in the Veins of Maud, Duke William's Consort.

If such Considerations did not engage on William's Side the hearty Zeal of the People, they at least were calculated to disarm Hostility. When, therefore, the Death of Harold had broken up the Party immediately opposed to Him, He met with no further Resistance to Claims, based, not on the Power of the Sword, but on the Laws and Constitutions of the Kingdom; which He had sworn to observe, and thus made it His Obligation, as it was His Policy, to maintain.

If He had nothing to fear from the Resistance of the Nation, there was no Cause to apprehend, that the Tranquillity of His Succession to the Crown would deprive Him of the Means of contenting, to the full, the Cupidity of His Followers. Domesday Book contains the Record of the ample Crown Lands, possessed by the Confessor at His Death, and thence called to this Day "*Terræ Regis*," or "*Lands in Antient Demesne*" (a).

Nor were those His only Resources. If His Claim were well founded,—if He had indeed inherited the Crown of England, it was from the Moment of the Death of the Confessor. Whatever Opposition He had since met with was consequently Treason,—punishable with the Death, or, more mercifully, with the Forfeiture of the Offender. Every Man who had fought against Him at Hastings,—every Man who had made ready for the same,—was in that Position.

The Foemen who survived, and the Heirs of those who fell, could not occupy their paternal Estates, without a Disheri-

(a) According to Lord Lyttleton, the Conqueror Himself held no fewer than 1422 Manors of His own Demesne, besides His Seignorial Rights as Suzerain over the Fees of other Lords. (*History of Henry II.* Vol. II. p. 288.)

son of the Crown to which these had escheated. Of another kind of Disherison they were guilty, who had accepted Grants of Crown Demesnes from the Usurper Harold. Against them there was nothing in the Saxon Law to prevent, and every Thing to urge, Prosecution of the desired Measures. Those only who came not within One or other of these Classes, could claim to be exempted from the Confiscation.

With whatever Results, such were the Maxims on which the Conquest was based, and by which it was sanctioned. Long afterwards they continued to be assented to.

In a Proceeding of Quo Warranto against the Abbot of Peterborough, in the Reign of Edward the Third, the Counsel prayed the Court to set aside a Charter of Edgar the Glorious, because they alleged that all Franchises were devolved to the Crown in Right of the Norman Conquest. But the Pretention was disallowed, and we find Judge Shardelowe expressing himself to the following Effect (*b*). "The Conqueror came not at all to oust them, which had right Possession, but them which, by their Wrong-Doing, had occupied Lands in Disherison of the King and His crown." A curious Illustration of the Judge's Words is to be found in some of the earlier Writers.

Edwin of Sharborne, (whom the Conqueror had ousted of his Castle and Lands in Norfolk, that He might give them to William de Warenne,) and certain others, who were also ousted of their Lands, came before the Conqueror, and said, that, never before His Conquest, nor during His Conquest, nor after, had they been against the King by Counsel, nor by Aid; but had kept them in Peace;—and this they were ready to verify as the King should ordain. Upon which, the same King caused Inquisition to be made throughout all England, if it were so,—the which was actually verified.

(*b*) Kelw. R. 143, *b*. (*In Itinere*; Temps. Edw. III.)

Wherefore the same King commanded, that all they, which had so kept them in Peace, in Manner aforesaid, should have again all their Lands and Demesnes, as entirely and as peacefully as ever they had them, or held them, before His Conquest (c).

It makes Nothing to the Purpose, that the Chronicles of the Time, agreeing with Domesday, speak of a very general Transmutation of Properties from Saxon to Norman Lords. We must take Care that we do not lend to these Statements a Meaning, which their Language does not warrant. We must remember that Domesday Book was not begun until considerably after William's Accession, and that it was finished only in the last Year before His Death. Between the Beginning of His Reigu, and the Completion of Domesday Book, there had happened many an unsuccessful Insurrection against His Authority, and, as an inevitable Consequence, many a Forfeiture. Marriages, Escheats, and the other Incidents of Tenure, must also be taken into Account. Certainly those were Circumstances which should have wrought great Alterations in the Proprietary Class ;—Changes not limited to Norman Times, but extending far down into those of the Plantagenets. Yet there is important Evidence to show that the Name of Norman, instead of conferring special Privileges of Conquest, did, at an early Period, import Alienage, and the Disabilities pertaining to such.

Among the Parliamentary Writs of the Ninth Year of Edward, there has been found a solemn Document, purporting to contain the unanimous Certificate of Ten eminent Lawyers, with the subsequent Confirmation of the same by the King in Council. It states, "that, in Writs of Quo Warranto, touching the Tenure of a Manor, it must be

(c) Spelm. Gloss. Voc. *Drenches*; Camd. Brit. p. 350; Davis's Irish Rep. fol. 41, a. b.

expressed to be either a Manor of Our Crown, or One that ought to be in Our Hands, as an Escheat from the Lands of Normans; *for there be many Manors that be neither of the Crown, nor of the Lands of Normans.* Wherefore, in claiming the Tenement, it is fit that the Matter of the Claim should be expressed" (d).

When to these Considerations are added the great Uncertainty and Looseness in the Language of all contemporary Authorities—insomuch that it is often difficult to collect, whether the Crown Grants, recorded to have been made, were made in Respect of the Land itself, or only of the superior Services issuing out of the Land—we shall find no Reason to conclude, that the general Change in the proprietary Classes, which is commonly associated with King William's Reign, took Place at all: much less that his Conquest was the Cause of it.

But, if William came in by Act of Law, and not by Conquest, in the vulgar Acceptation of the Word, so had his Barons. The Law of England maintained them, in the Possessions which the lawful Sovereigns of England had conferred. It was not their Policy to suffer the Abrogation of that Law; even were it his to attempt it. They were not the less fitted to appreciate its Value, from the Circumstance, that to them it was neither foreign nor strange. The Teutonic Institutions were all of One Family;—all presented the same Likeness.

The Names might have been changed, and the Individuals; but the Saxon Institutions did, for the most Part, long survive the Conquest. Thus, the "Sapientiores," or "Curia," of Norman Legists, were but the "Witan" of their Predecessors. When the Saxon Chronicle commemorates the Assembling of the "Great Councils" of the Norman Princes, it is still under their old Designation of

(d) I. Parliamentary Writs, p. 383 (7).

“Witenagemot.” It is true, that this was no longer the Language of the Law. The Memory of the Thaness of the Witan was no more. Men spake only of the Barons of the Council, and the Anglo-Saxon Tongue was no longer heard within that High Court of Justice. But, in Fact, Baron was Thane! Parliament was Witan! Anglo-Norman was English!

Perhaps the greatest Change effected in the Administration of public Affairs, was the partial Separation of the Ecclesiastical and Temporal Jurisdictions; by the Removal of the Bishop, from the Shire Court, to a distinct Tribunal of his own. But, important as the Consequences of this Measure afterwards became, they were neither intended by the Conqueror, nor did they immediately appear. Contemporary Writers scarcely allude to the Alteration. To them it must have appeared as little more than the Recognition of a Principle, already known to the Law, which guarded the Independence of the Church. We have seen, that, although in the Anglo-Saxon Courts the Earl presided with the Bishop, still the Office of declaring the Law was confined to the One or to the Other—according to the Complexion of the Case. If it were an Ecclesiastical Matter that demanded Examination, only the Bishop sat as Judge, and the Earl was but his Coadjutor; for the Infliction probably of Temporal Punishments. If the Case were of a purely Municipal Character, then the Earl was the Judge, and the Bishop the Coadjutor, by whom the Anathema of the Church was called in Aid of the Temporal Sentence (e). Thus, even when the Bishop and Earl (or his Sheriff) sat together in County Court, there was a real Division of Jurisdiction in the Practice. The Ordinance of the Conqueror made no Change in that Respect.

But, in its ultimate Consequences, the Importance of the

(e) 1 Reeve's Hist. of E. Law, pp. 7, 47.

Change was as great as these were unforeseen. It created a new Court of Sovereign Jurisdiction. It alienated gradually Church from State, and State from Church.

If, in the Anglo-Saxon Times, the Reverence, which each entertained for the Rights and Liberties of the other, presented a divided Administration,—far from destroying, this riveted their Harmony. But their formal Separation,—as it seemed to be the Indication of incipient Distrust, so it fostered that ill Feeling. The Contest of Investitures grew out of it.

The Ordinance in Question is to be found in the celebrated Charter of William the First, touching the Bishopric of Lincoln (f). It is to this Purport:—

“No Bishop or Archdeacon shall henceforward hold Plea of Bishop’s-Law in the Hundred-Court; neither submit, unto the Judgment of Laymen, any Cause which toucheth the Cure of Souls. Whosoever is proceeded against for any Matter or Offence, under Bishop’s-Law, let him repair into such Place as the Bishop shall appoint, and there make Answer unto the Charge, and do Right towards God and the Bishop; not after the Law used in the Hundred, but after Canons, and Bishop’s-Law. If, after Three Notifications, he shall refuse to obey the Process of the Court, and submit himself, let him be excommunicated; and let the King’s Aid, or the Sheriff’s (g), be called in. Moreover, the King strictly charged and commanded that no Sheriff, Reeve, or Officer of His, nor other Laymen soever, should meddle in any Matter of Judicature belonging to the Bishop.”

When the Church and State had thus ceased to act in

(f) Wilk. Leg. Ang.-Sax. pp. 292—3.

(g) According as the Case was within the Resort of the Curia Regis, or of the Sheriff’s Tourn.

Concert, it is not wonderful that they began to be brought into Collision.

Differences, which before were almost unheeded, now became the Subject of grave Jealousies. Each Jurisdiction had its own Privilege to maintain,—its own Dignity to vindicate; nor was it always easy to determine the Forum of the Litigant. In many Cases, indeed, the Line of Separation was broad enough. But some were of a mixed Character,—and in these it was difficult to adjudicate, without appearing to encroach upon the rival Jurisdiction. Hence are to be dated the famous Controversies between St. Anselm and William Rufus—between Henry the Second and St. Thomas of Canterbury,—and which the memorable Death of the latter, though followed by the Submission of the Prince, did not altogether extinguish.

The immediate Question at Issue was that of Investiture. The King claimed from Prelates the same unconditional Homage as that which Barons rendered. But the Prelates were not bound to admit that Claim. It was true that their Temporalities were held of the Crown, but only as appendant to their Spiritualities;—and these, according to the Law of England, were held, not of the Crown, but of the Pope. Were the Prelates to render unconditional Homage to the King, they would violate the Law to which the King Himself was subject; for the Law it was that made Him King (*h*). They would forfeit the Independence, and even the Character, of their Order. The Distinction of Powers was no longer in Question. It became a Struggle, upon whose Issue depended, not the Maintenance of both as of Two co-ordinate Authorities, but the Predominance of One, and that the least intelligent. To the Church, Victory was at least the Certainty of Freedom, and the Chance of Sovereignty—whilst Defeat was certain Annihilation.

(*h*) Bracton, Lib. I. Cap. 8.



Had She succumbed in the Contest, She must inevitably have ended by becoming that Thing, which the Greek Church had already submitted to become, the merest Engine of Temporal Administration. To Her, therefore, the Struggle was One of Life and Death (i).

But here *was* Resistance, and the Church was saved. The obnoxious Clauses in the Constitutions of Clarendon were revoked by the Monarch, with the Assent of the Curia; and Peace was restored to the Commonwealth by maintaining of its Laws. The Prince thus abating his Pretensions to a direct Ascendancy over the Church,—the Church was enabled to relinquish the parallel Claim, which, in Her Turn, and for Her own Protection, She had set up. When the temporal Investiture was no longer demanded, as an essential Preliminary to the canonical Election of the Prelate, the latter was without a Motive for declining to receive it. Homage could no longer be refused, in Respect of the Temporalities of the See, when the Independence of the Spiritualities was definitively acknowledged and established.

From this Period, we find the Church of England again actively and extensively occupied, as in the Saxon Time, with the Concerns of State, and the Maintenance of Right and Justice, both at Home and Abroad. It is a gross Misconception of the Part, which Religion takes in the Affairs of every Community, to associate it with Systems or Forms of Government; much more, as Oracles of the Day are prone to do, with those of Caste and Party. "The Church," says an illustrious Writer, "never designed to make Herself Imperialist, nor Barbarian, nor Feudalist, nor Royalist, nor Liberal; for She is more than all; She is Catholic (k)!" The Prelates, in Obedience to the King's

(i) Eichorn's *Deutsche Staats- und Rechtsgeschichte*; Part II. Sects. 276—9.

(k) *Deux Chanceliers d'Angleterre*, par A. F. Ozanam, p. 213.

Writ, put in Force the tremendous Discipline of their Churches, against seditious and slanderous Disturbers of the People (i). The same Prelates, Twice in every Year, read aloud from their own Cathedral Churches to the People of England Magna Carta,—and the Confirmations of the same,—by which the King had covenanted to do them Justice ;—and they enjoined the Priests and Confessors to frame the Consciences of the People to the Observance thereof (k); and they denounced the same Anathema against whatsoever Persons should dare to violate them (l). The Clergy offered Prayer and Sacrifice for the good Success in War of their Liege Lord, as their Duty called them. But the Writ which solicited the Sanctions of Religion on Behalf of the Measures of the State, was careful to show that the Sanctions might be given with Safety. Therein the Justice of the Cause was not only recited—it was shown (m). To those Men the Prophecy of Malachias was no dead Letter. In the English Churchman of the Plantagenet Time that Prophecy was fully verified. “The Law of Truth was in his Mouth, and Iniquity was not found in his Lips. In Peace, and in Equity, he walked with Me, and turned away many from Iniquity. For the Lips of the Priest shall keep Knowledge, and the Law they shall require of his Mouth : because he is the Angel of the Lord of Hosts” (n). A great and glorious Calling ! and One, of which Priest and People were then alike mindful to exact the Performance.

(i) II. Parl. Writs, Div. II. p. 160 (42).

(k) Pupilla Oculi ; F. 50, Cap. 22. De Sententiâ Latâ Super Magnum Cartum.

(l) 25 E. I. Ch. 3, 4. (Conf. Cart.)

(m) I. Parl. Writs, p. 261 (4).

(n) Lex Veritatis fuit in Ore ejus ; et Iniquitas non est inventa in Labiis ejus. In Pace et in Æquitate ambulavit Mecum, et multos avertit ab Iniquitate. Labia enim Sacerdotis custodient Scientiam ; et Legem requirunt ex Ore ejus ; quia Angelus Domini Exercituum est. Malach. Cap. II. vv. 6, 7.)

Still, the evil Consequences of the unhappy Controversy of Investitures continued to be felt; by Churchman and by Lay. It is always easy to produce Jealousies, and always hard to allay them. In the continual Debates upon Provisors, Premunire, and the like Subjects, in after Days, we may clearly trace the Footsteps of an Hostility old as the Norman Time!

The withdrawal of Prelates from the Tribunals of Temporal Jurisdiction had one other Effect; of an inferior Importance for the Time. Next to the Tribunal in which the Sovereign Himself, or His Justiciary, (or Regent,) presided, the Shire Court held the chief Place. But, when the Bishop of the Diocess ceased to preside, the greater Part of its Importance seemed to vanish. The popular Confidence was not so readily awarded to the Court, when under the sole Direction of the Earl, (perchance of foreign Race,) as when tempered by the co-ordinate Authority of the Bishop. Nor was this all. The Vigour, which the Conqueror had displayed in his personal Administration, naturally produced a great Development of the Royal Witan, or Curia, both in Popularity and Importance. The Local Courts began to be abandoned. The Powerful and Wealthy, whether Suitors or Judges, thronged to Winchester, to Westminster, to York, or to Gloucester; according as the Seasons varied, for summoning the Curia Regis. From that Period, perhaps,—yet still darkly and faintly,—is to be traced the Course of that centralising Movement, which now has well nigh ended, by draining from each Member its proper Life and Action, and gorging and loading the Head.

The Removal of the Bishop from the County Court was soon followed by the Disappearance of the Earl, and the permanent Substitution of the Sheriff.

This Decline in the Splendour of the Tribunal was coincident with that of its Usefulness. The Learning of the

Local Judges no longer kept Pace with the Wants of the Epoch. Suitors, who could not afford to "fine" for the Royal Licence, were compelled, as of Yore, to resort to the County Court, for the Liquidation of their Controversies. The Wealthier repaired to the Sovereign. By those Means the Influence of the Witenagemot alone increased, while that of every other Gemot began to languish.

By Henry the First, an ineffectual Endeavour was made, to arrest the Progress of the Disorder. To restore, as far as possible, the Antient Dignity of the Shire Moot, that Prince, by Assent of the Curia, ordained that not only the common Freeholders, but the Bishops, Barons, and Great Men,—Clergy and Lay,—should repair, each to his own County Court, there to hear the Charge of the Sheriff, (or Viscount,) and to take the Hyld Oath to the King. But it is doubtful whether this Ordinance was ever put in actual Execution. Whatever may have been the Causes of Failure, there is no Doubt that, within a very few Years, it had utterly failed of its Effect. The Justices in Eyre, (or Errantes,) were specially commissioned by King Henry the Second to supply, as far as possible, the Deficiency. They had been already tried, and found to be admirably fitted for any Emergency. It was to such a Commission that William the Conqueror had intrusted the Great Surveys of the Realm, and the making of Domesday Book. They reappeared, at various Intervals, under the immediate Successors of the Conqueror. But it was not until the Reign of Henry Fitz Empress that they became permanently established, as the ordinary "Missi" of the Sovereign, for the Government and Judicial Administration of the Provinces. Certainly that was a great Innovation in the Form and Order of Procedure; but it was far from being the Result of an Hostility or Jealousy, on the Part of the Plantagenet Prince, towards the Laws and Customs of

his English Subjects. Henry had no such Feelings; nor are such attributed to him even by the most polemical Writers. In his Reign, at all Events, the Fusion of Anglo-Norman and Anglo-Saxon was already accomplished (*o*). Nor, in the Selection of his Justices, did he give any Preference to Race. Shortly after the Second Division of England into Circuits, we find amongst the Justices Itinerant, who went the Home Circuit, the now famous Name of Abbot Sampson of St. Edmundsbury. Both by Descent and by Birth, this extraordinary Man was unquestionably English,—and so little Norman in his Predilections, that, according to his Biographer, he was wont to put the more Trust in the Yeoman, who added to a good Character for Husbandry that of not knowing French (*p*).

Nor were the Functions of those Justices new or strange. They were appointed to execute Old Laws,—not to ordain New. Their Instrumentality was demanded for the Discharge of Duties, in the Shire Moots, which, under the Saxon Kings, had been discharged by the Earls, and which those Courts, under the Sheriffs, were now less fitted to accomplish (*q*).

In the Discharge of these Duties, the Justices Itinerant were still assisted by the Antient Representatives of the Communities through which they passed. The Jurors of each Hundred, and the Four Men and Reeve of each Township, came before them in the Court, where they sate administering Justice for the Shire, and there received from them the Charge of the Sovereign, and, in Return, presented, or made known, to the Justices, the Wants and Wishes and

(*o*) *Dialogus de Scaccario*, p. 26.

(*p*) *Chron. Jocelini de Brakelonda*, pp. 24—5.

(*q*) *MS. Hist. of the Common Law*, Tem. Car. I. penes me; p. 76; *I. Reeve's Hist. of English Law*, pp. 47, 52; *I. Rot. Claus. Introd.* xxiii—iv.

Grievances of their several Jurisdictions (*r*). It was by means of Assemblies so constituted, that the Tallages upon the King's Demesnes were assessed and levied; and, upon Occasion, Inquests or Surveys taken throughout the Realm. In such an Assembly, the Justices of Henry Fitz Empress exacted the Pledges, which all Sheriffs and their Deputies gave, to appear before the King at a Day certain, and there to do Right, and make Amends to those, whom they had injured by Extortions or otherwise. And an Oath was administered to all Barons, Knights, Freemen, Citizens, and Burgesses, that, concerning all that should be required of them on the King's Behalf, they would speak the Truth; and, neither for Love, nor for Hatred, for Favour, nor for Affection, for Gift, nor for Reward, conceal the same. And so they were to present all Manner of wrongful Exactions, levied upon their Hundreds, or Townships, and the respective Amounts of the same; all Manner of unjust and causeless Indictments of the Innocent, and Protections of the Guilty; all Manner of unlawful or undue Levies of Rent; all manner of Extortions committed by Prelates; and all Manner of Omissions or Refusals of Homage to the King, by whomsoever perpetrated (*s*).

The following highly interesting Account of the Commission to the Justices in Eyre, in the Fifteenth Year of King Edward the Third, is taken from "The French Chronicle of London;" a contemporaneous Record recently and for the first Time published (*t*).

"And the Sunday next following, there was made the Cry throughout London, that each One, High and Low, which owed Fealty or Service unto the King, behoved to be

(*r*) Rise and Progress, &c. Vol. I. p. 297.

(*s*) *Ibid*, Vol. I. pp. 293—4.

(*t*) "Croniques de London;" (Edited by George James Aungier. London. Printed for the Camden Society; 1844.) Pp. 88—90.

ready at the Tower of London the First [and] Second Monday of Lent, before Sir Robert Perninke and his Fellowes, Justices in Eyre assigned. These were the certain Points ordained by Sir William de Killesby, and others of the King's Council;—First, to inquire of all Manner of Oppressions, Wrongs, Damages, Grievances, and Moles-tations, done by every the King's Ministers, and of their Deportment towards Our Lord the King and the Common People; that is to wit, of Justices of the One Bench and of the Other; of Justices to hold Pleas of the Forest, of Justices to take the Assises and to deliver the Gaols; and of all other Justices;—also of Escheators and Sub-Es-cheators; Coroners; Sheriffs; of their Clerks and their Ministers;—also of Taxors, Sub-Taxors, and of their Clerks; of Admirals of Navy-Fleets, and of Others asso-ciate unto them;—also of Wardens; Constables of Castles; Conservators for Keeping of the Peace; of Pernors and Receivors of Wools, and of Other adjoined unto them; of Sessors and Vendors of Wools of the King and Others, aiding unto them by divers Times granted; of Barons of the King's Exchequer, and other Places of the King; of Wardens of Forests Vert, of their Clerks, and Ministers, of Forests, of Chases, and of Parks; of Ga-therers of Customs; Countreroullers; Tronetaries (*u*); Bo-tillers; and their Associates; of the Receivers of Moneys of the King in Pairs, and of them that conceal them; Seneschals and Marshals, and of their Clerks;—also of Wardens of Horse of the King, and of their Lads;—of Purveyors for the King's Hostel, and for Sir E. Duke of Cornwall; of Wardens of Gaols; of Choosers traitorously of Men-at-Arms, Hobelers, and Archers, and of their As-sociates; of Bailiffs in Eyre, and of all other Bailiffs what-soever they be;—also of them which Wools, or other Mer-

(*u*) Weighers of Wool (Blount).

chandises, without Custom unto Us rendered, have, against the Prohibition, out of the Realm falsely carried; of them which maintain False Pleas in Assises, and other False Plaints;—also of Evil-doers, within Marches and other private Places, armed, beating and wounding the Folk till such Time as that, unto themselves, they may Ransom-Fine of them take; of all Manner Oppressions, Duresses, and Grievances, done by what Persons soever it be; Arch-deacon; Dean; Official; Sequestrator; and their Commis-saries and Ministers; also of them which Change do make of Moneys, or of other Goods, or any other Manner Colour of Usury; of them which [have done] any Thing falsely, by Colour of their Office, or other Manner, for doing of their Office, or with any other have sided, favoured, or have of others taken tortiously. And, at that Time, Trailbaston lay throughout England; and certain Justices assigned to sue in each County, to inquire and to examine all the Points afore named; and so was made great Duress to the People throughout England. And, at the Fifteenth of Easter, the King began His General Parliament at Westmin-ster; and the Eyre was adjourned till such other Time as the Parliament was ended.”

For, in the Presence of that Superior Jurisdiction, the Functions of every derivative Jurisdiction were as of Course superseded. On the Arrival of the Justices in Eyre, the Authority of the Conservators, or Justices of the Peace, of the City or Town virtually ceased, and revived only when the “Iter” was determined (x). In like Manner, the Authority of the Justices in Eyre was suspended, at every Meeting of that High Council which bestowed it.

As the Authority of the Justices was but an Emanation from the Curia Regis, so they were always responsible to that Court for their Manner of exercising it.

(x) Bro. Abr. Commission, Pl. 9, 10.



The Curia Regis, Great Council, or Parliament was, as we have seen, identical, in all but Name, with the antient Witenagemot. Both were held at the same Seasons of the Year, and in the same Localities. To both, the same Classes of Councillors resorted. In both, the Sovereign Himself was President. It is true that, from the Period of the Conquest, the Four men and Reeve, those legitimate Representatives of the Township, do not appear so frequently in the King's High Court. But the increasing Importance of that Court made longer Deliberations necessary; and the Inconvenience which these would occasion to the humble Residents of so many, and such distant, Vicinages, was the only Reason why their Presence there was no longer demanded (y); the more so, since, as you have already seen, it was never essentially requisite in order to constitute the Court. If they came, it was always to listen to what was said, and to witness what was done, and to present to the Court what Wrongs or Scandals, their Vicinages,—for the Jurisdiction of each was purely local,—had to complain of.

The Court, thus constituted, had supreme and entire Jurisdiction over all Offences, by whomsoever committed, and wheresoever within the Realm. Over Offences, elsewhere committed, no Tribunal within the Realm could exercise Jurisdiction at all. It was against Law and Right to put the Criminal upon his Trial in a strange Land, where his Witnesses were not. To surrender him to the Pursuer, was as little consonant to the Laws of England, whose Hospitality and Protection the Fugitive had invoked, as to the Honour and Dignity of the Crown. Extradition-Treaties would have been spurned with the Execration they merit. But they were altogether unknown. The occasional Arrest, or Detainer, of foreign Offenders was known, but only as an

(y) Rise and Progress, &c., Vol. I. pp. 297—8.

Infraction to be redressed. "Since it is a Thing dissonant to Right, and unaccustomed," writes Henry III. (z), "that any One should be punished, in the Realm of the King of England, for any Offence which he did in Foreign Lands, it is charged unto the Constable of Windsor Castle, that William, whom, for a certain Forfeiture, which, as is said, he committed in Normandy, he hath caused to be arrested and doth Captive keep, he do, without delay, cause to be delivered; suffering him lawfully to depart whither soever he shall be minded."

Fewer of the Thanes of Hundreds are to be found in the Assemblies of Law and Justice, after the Conquest. Yet they were always represented there. Deputations were more easily congregated than the whole Body; and, so far as they were empowered by their Constituents, these, by their Suffrages, were competent to bind the rest. The Twelve Jurors from every Shire, like the Echevins of the Frankish Empire, or the Deputies of the Netherlandish States, represented in the "Placitum," where their Sovereign sat, surrounded by His Nobles, not only the Collective Shire, but also every Hundred and Township which helped to compose it. Still their Delegation, like that of the same Echevins and Deputies, was limited to the Objects for which it was given. They had no Powers to act upon behalf of their "Community," save such as that "Community" had especially conferred; and their Authority expired with the Purpose.

The Conqueror, in 1070, held at Gloucester a great Assembly, of Saxon and Norman Lords, and other wise and eminent Personages; in Order, we are told, to become better acquainted with the Laws of England. In this Assembly he proposed the general Substitution of the East Anglian,

(z) Rot. Claus. 36 Hen. III. 27 July; M. 8.

and Northumbrian, or Danish, Usages for those of the Anglo-Saxons, throughout the Kingdom. But the Assembly, with One Voice, demanded the Laws and Customs, which had obtained in the Good Days of Saint Edward; and they obtested the Conqueror, by the Soul of that Holy Prince, that he would deny them not. To this Demand, William, after some Hesitation, assented. "Twelve" Men from every Shire were therefore summoned; "who were sworn, that they would well and truly declare the Law, without Addition, Prevarication, or Concealment." \* That special Duty was performed. A Code, or Capitulary, resulting from their Presentments and Declarations, was prepared and read to them; which, thus approved, received that solemn Sanction of the Sovereign in Council, whereby it obtained the Force of Law, or, more properly speaking, was thenceforward to retain it. That Code still exists, both in Romance and Latin, and, in either Text, bearing the coeval Title of "Laws, which King William granted to the People of England, after the Conquest; being the same which King Edward his Cousin held before him" (z). In the Judgment of Lord Hale, the Assembly at Gloucester, at which these Laws were so adopted, was as "sufficient and effectual a Parliament as ever was held in England" (a).

The Municipal Constitution of England at this Epoch very much facilitated such Delegations of a public Trust. The Machinery, that served for local Administration, was equally well adapted for the Concentration of Powers in a central Assembly of Elected Representatives. The Four Men and the Reeve, being themselves elected by the Courts Leet, or Courts Baron, of their Townships, were competent to receive and to execute whatever Commission their Fellows might think fit to give. The Twelve Sworn Thanes,

(z) Rise and Progress, &c., Vol. I. pp. 54, 114, 124.

(a) I. History of the Common Law, p. 202.

or "Jurors," whom the Hundred or Burgh sent to represent it at the Shire Court, could be authorised to concur with those from other Burghs or Hundreds, in delegating to "Twelve," or to "Twenty-Four," of the whole Body assembled, the Duty of representing, and the Power of binding, their respective Communities, in Parliament. That Delegation might be granted by some; and it might be withheld by others; and it might be more or less ample, according to the Instructions sent. But, beyond those Instructions, the Duodenary Committee of Delegates had no Power to act; and, when they proved insufficient, a new Recourse was to be had to the Shire Court, and thence again to every Hundred Court, and to every Court Baron or Leet. The Authority of those Constituent Assemblies was not suspended by the Delegation, nor in any Degree affected by it, further than in Terms particularly expressed. Above all, the practical Accomplishment of the Trust confided to the Delegate was always reserved to the Constituents. If the former assented to the Levy of Array, or the Grant of Subsidy, or Aid, he could not deprive the latter of the Privilege of "electing" the Taxors, or of assessing and raising the Tax.

Every One of the Monarchies of the Gothic Race, which were founded upon the Ruins of the Roman Empire, as a learned Irish Royalist Exile of the last Century has well remarked, was essentially a limited Monarchy, and not an absolute one. But the Limitations, by which the Royal Prerogative was restrained, regarded the Measures of Peace, the Means of War, and the regular Administration of Justice only—and not the daily Bread of the Sovereigns; who had Lands and immediate Vassalages of their own, for the Support of their Estate and Dignity (*b*). But this is far

(*b*) Sir Charles Wogan's Letter to Dean Swift; 27 February, 1732; *apud* Swift's Works (by Roscoe), Vol. II. p. 674. (1841.)

short of the Truth. Much of the Means of War, and of the regular Administration of Justice, were provided out of those very "Lands and immediate Vassalages;" for then "the Estate and Dignity" of the King consisted in the Honour and Happiness of the State. The Military Tenures supplied a sufficient armed Force, for the Conduct of almost any War. Until lately, the Judges in Westminster Hall had no other Provision than what the ordinary Revenues of the Crown afforded. It was only for extraordinary Purposes that Recourse was ever had to extraordinary Sources. But this is not all. If the learned Author imagined, that what was said of those Monarchies of the Gothic Race was true of them only, he erred greatly. He might, with equal Truth, have said quite as much, and more, of every antient Monarchy, of whatsoever Race. It is an old Remark, and a true One, that it is Freedom which is antient, and Tyranny which is new. Take the old Roman Monarchy, for Example; and you will find, that the Crown Lands of its Kings were appropriated to the very same Purposes, as were, in this Country, the Maenawls of British Princes, or the Antient Demesne Lands, and the other Hereditary Revenues, of their Saxon and Norman Successors. The Roman Kings had no other Revenue to provide the Means of War, of the regular Administration of Justice, or of the Support of their own Estate and Dignity. But, on the other Hand, the Appropriation of the Crown Lands to the Roman Crown was held so sacred, that it depended not upon the Senate or the People to confirm, what it was beyond their Power to divest (c). Long after the Revolution of 1688, arose here that improvident and mischievous Practice, which now marks the Commencement of every Reign. The Sovereign

(c) Pliny, XVIII. 3; Varro. Ll. IV. 4; Isidor. Orig. XV. 13; Dionys. IV. 25; Cicero de Republicâ, Lib. V. Sec. II. f. 247 (p. 297).

surrenders the Hereditary Crown Revenues to Parliament, for the Life of the Grantor, and receives in Exchange a Civil List of the same Duration. The Amount of the Compensation is decreasing with every Reign, whilst that of the Revenues is ever rising. What the annual Value of the Crown Lands may be it is difficult to ascertain; but that of the other Revenues is Matter of Notoriety. From a Parliamentary Return, made soon after the Accession of Her Majesty, the total Amount of the Hereditary Crown Revenues, (independently of the Crown Lands,) from the 25th October, 1760, to the 20th June, 1837, the respective Dates of Accession of King George III., and of Her Majesty, to the British Throne, was £116,784,816 18s. 5d. The total Amount of the Civil List received, during the same Period, in Exchange for those Revenues,—including the total Amount of extraordinary Grants, at various Times made by Parliament, for Discharge of Civil List Debts, and Fees of suppressed Offices,—was only £69,385,031 15s. 10½d. The Balance, therefore, in Favour of Parliament, was £47,399,785 2s. 6¾d. In the last Year of the Reign of King William IV., the Amount of those Crown Revenues is quoted at £3,449,724 16s. 3d.; and the Civil List granted in Exchange was only £510,000 (d). The Civil List granted to Her present Majesty was reduced still further. The Act (e), which recites the Surrender of the Crown Revenues, settles, in Lieu of them, a Civil List of only £385,000 upon Her Majesty. Yet the Improvidence of the Bargain is the least of the Objections to the Measure. The Queen ought not to be compelled to depend for the Maintenance of Her Household, and of the Honour and Dignity of Her Family and Crown, upon the Taxation of Her People (f).

But, so long as the Civil List is continued, you will do

(d) Parl. Pa. No. 3, Sess. 1837—8. (e) 1 Vict. c. 2.

(f) Wglls on the National Finances, p. 301.

well to remember what is the Principle on which it exists. It is the Substitute for the Private Revenues of the Sovereign ; and it therefore becomes,—what they would be were no Surrender of them to take Place—the absolute Property of the Sovereign. It must not be confounded with the Supplies ; which are extraordinary Aids, and would be just as necessary whether the Hereditary Revenues were vested in the Crown or in the Parliament. Over the latter the Community possesses a Discretion of Refusal. Over the Former it has no Discretion at all. It is bound by its Compact.

Before quitting this Subject, I refer you to the following pertinent Observations ; which I find in a learned Work of Dr. Davenant (*g*).

If a Prince makes War at His own single Charges,—as Grotius observes, *feri potuit, ut Rex ex Suâ privatâ Substantiâ Exercitum aluerit* (*h*),—in such a Case, He alone will have a Right to the Conquered Country.

Thus, if Henry the Second had conquered Ireland with only the Revenues of the Crown, without any Aids from His People, that Kingdom had been His own, *pleno Jure*, as the Civilians call it ; and He might have disposed of it at His own Will and Pleasure. For, as Aristotle says, *Lex est veluti Pactum quoddam commune, quo Bello capta capientium sunt*. Nor is it a Thing at all strange, for a Prince to hold different Kingdoms by different Titles, and to govern them by different Methods. In One, He may be absolute ; according to the antient Constitution of the Country. In another, His Power may be circumscribed and limited by Law. One Kingdom He may hold by Election, and another by the Right of Succession. He may have a Kingdom of His own

(*g*) Discourse upon Grants and Resumptions ; pp. 407—9, 415—16. (London, 1700.)

(*h*) Grotius, Lib. I. Cap. III. Num. 11.

Acquisition, which shall be, as it were, His own private Patrimony. “A Principibus (i) aliquando Regna vel Territoria pleno Jure habentur; ita Strabo tradit Cytheram-Insulam, Tænaro objacentem, fuisse Euriclis, Lacedæmoniorum Principis, privato ipsius Jure.” And the same Right would Henry the Second have had in Ireland, if He had made the Acquisition by His own Sword and Bow, and by Troops paid out of His own Purse. The same Distinction prevails, as to Confiscations of Estates forfeited by Rebellion. In common Confiscations, the Traitor is prosecuted and brought to Punishment at the King’s sole Expense;—and therefore to the King alone belong the Profits of his Forfeiture. But the Case is quite otherwise when a whole Nation rebels; and, when that Rebellion is to be suppressed at the Infinite Expenses of the People, it seems rather that what accrues thus to the Prince and People (for they always have, or should have, a Joint Interest) ought to be more sacredly devoted to public Uses than any other Thing;—“because,” says Davenant, “it is the Price of Blood.”

I have been led at greater Length into the Consideration of this incidental Topic than I could have wished. But I can scarcely call it a Digression. It is intimately connected with the main Subjects before us. Nor is it possible for you to understand the One, unless you have examined the other. At present I resume my Narrative.

When an Invasion, or other extraordinary Emergency, made it lawful for the King to summon the Array, those to whom the Commission for that Purpose was directed swore Oath in the Presence of the Archbishops and Bishops of their Respective Diocesses, and thereby bound themselves duly to execute the same (k); after which

(i) De Jure inter Gentes; P. I. Sec. 3, R. Z.

(k) II. Parl. Writs, Div. II. pp. 665, 668.



they resorted to the Sheriff of the County or Place, where they happened to be, and caused him to summon "Twelve Jurors," in and of every Township or Village, not being a City, Borough, or Crown Demesne, within his Jurisdiction, and whereof the Array was to be taken. The Election of the Township was then made upon their Presentment, before the Sheriff and the Commissioners of Array. Every Male; between the Ages of Sixteen and Sixty,—whether High or Low, and whether the King's Tenant or not,—if able-bodied, was liable to be the One Man "Elected," and "Presented," upon Oath, to serve for the rest (*l*). If he neglected or refused to serve, his Name was returned, as that of a Defaulter or Deserter, to the Council (*m*), and he was liable to the customary Punishments of such; viz., Imprisonment, until Fine made to an Amount double that of the Pay actually received by him (*n*); or Imprisonment, Fine, Attachment, and Forfeiture of Lands, Goods and Chattels, and other Punishments, at the Council's Discretion (*o*); or even Death itself (*p*).

The same is to be said of the Method of Assessment and Levy; where a Money Supply was the Subject of the Parliamentary Grant. The Grant was either of some specific Sum, or else it had Reference to a fictitious Scale of Rates of an ascertained Value. For Instance, you will frequently meet with the Grant of a Tenth or Fifteenth, or other Proportion. You must not suppose that the Estimates in those Cases were taken of the full Value. It was alto-

(*l*) 7 Hen. IV. Br. Abr. Tenures, Pl. 44, 73; Fitzh. Abr. Protection, Pl. 100; 7 Co. 7. *b.*; 1 Inst. 69. *b.*; 2 Inst. 528.

(*m*) II. Parl. Writs, Div. II. p. 464 (43); *Ib.* p. 436 (3).

(*n*) I. Parl. Writs, pp. 329 (12), 339—40 (22), 344 (38).

(*o*) *Ib.* pp. 378 (24), 379 (2); II. Parl. Writs, pp. 479 (19), 507 (11), 527 (79).

(*p*) *Ib.* pp. 526 (76), 553 (68), 555 (80).

gether the Contrary. The Property to be taxed was taken at a Value, considerably below its lowest imaginable Amount; and then the Fifteenth, or Subsidy, was assessed according to that Value. Thus the Fifteenth, according to Lord Coke (g), was an ascertained Sum of Money, amounting to Twenty-Nine Thousand Pounds, and the Subsidy another liquidated Sum, amounting to Seventy Thousand Pounds. He adds, that for the greater Part of Queen Elizabeth's Time, the Subsidy came to One Hundred Thousand Pounds; but that was only by the Diligence and Care of the Commissioners appointed by Her. An undue Lenity was none of her Vices.

The Quota of the Shire was assessed in the Exchequer. The Earls, Barons, Knights of the Shire, and the Freeholders, owing Suit and Service at the Shire Court, were, by Writ to them directed, required to assist the Taxors. There were, for every Hundred, the "Four Knights," chosen and sworn by the Jurors of the Shire Court. The Quota of the Township or Vill was to be assessed by its "Four Lawful Men," or by more, as Need required, or as the Four Sworn Knights thought fit; and these, upon their Oaths and the Presentment of the Court Leet, were to make the Inquisition, and to seal and indent it, and so to return it to the Four Sworn Knights. Those did, thereupon, cause the Tax to be levied, upon Chattels, and Estates, and Monies, and other Matters of direct Taxation, —(for indirect Taxes were the barbarous Productions of a later Age)—and again it was through the Court Leet that they levied it;—for the Resiants knew best the Circumstances of their own Vicinages, and whom to burthen and whom to spare. Afterwards the Taxors returned into the

(g) 4 Inst. p. 33.

Exchequer, in the Names of the Barons, the net Amounts so levied under their Inquisition (r).

The Matter is plain enough. All resolves itself into One Point :—the Obligation of attending to your own Affairs. The Affairs of the State are your Affairs. The State is the Aggregate ; we are its Members. Our Properties are the Ways and Means of its Finance. When we ceased to be concerned in the Administration of that Finance, we lost the Conduct of our own. And we ceased to be concerned in the financial Administration when we lost the Sense of our proper Position in the State ;—insomuch, that now, for Fortune, Liberty, and Honour, we are no longer in our own Hands, but in the Hands of others whom we control not ; and—

“ *Quicquid delirant Reges plectuntur Achivi.* ”

There is One Part of this Empire, where Men are still to be found treading in the common Footsteps of their and our Forefathers,—keeping still the Path from which we have turned,—and doing their best against us to preserve it. When Indian Empire first devolved upon us, there existed, throughout that mighty Territory, the same sound System of Finance, the same Fiscal Administration, the same Franchises of the Shire, the Hundred, and the Vill, the same Collective and Seignorial Frankpledge, the same Division of Tythings, and generally the same good Laws and Constitutions, which, at the Period I have been describing, flourished here,—which had been brought here by the First Planters of our pristine Settlements from the older—from the primeval—Seats of Mankind in the East, by “the audacious Race of Japhet,” when they planted the Isles, and the Continent of Europe,—and which are still universal throughout the East, wheresoever the Curse

(r) I. Parl. Writs, pp. 105 (46), 178—9, (48), 409 (63) ; II. Parl. Writs, Div. II. pp. 15—16 (36).

of our modern "Civilisation" has not come, or has been happily averted (*s*). There is nothing in such Coincidences to surprise. The Wonder would be if they were not. The Authority of that Passage I quoted from the Edda, in my last Lecture,—and which expressly says, that our first Ancestor, Woden, carried Phrygian Institutions into Scandinavia, and appointed Laws to be administered, and Judgments to be rendered, according to the Customs of the Turks,—does but corroborate the Testimony which the Conscience of every Man who believes in the Mosaical Narrative of the First Ages of the World, must perfectly establish. And, with even greater Veneration for the First Seats of the great Family of Man, than Rome had for the Founder of her Empire, the Name of Asa, (Asiatic,) which Woden bore, and under which he was deified, became afterwards the generic Appellation of all the other Gods of the Mythology of the North (*t*).

In 1799, the intelligent and honest European Magistrate of the Jaghire of Arcot, Mr. Place, in an official Report, afterwards published here by Order of Parliament (*u*), thus described the actual Condition of that District; founding upon it an earnest Protest against, what he justly calls, the "superfluous, impracticable, and impolitic" Changes,—then meditated, and which, it is melancholy to think, have been since carried into Effect in several of the Provinces.

Even to attempt to centralise their fiscal Institutions, he argues, would, in the First Place, strengthen those Suspicions which have arisen; and, in the next Place, it could only be done by a personal Survey, and the most unremitting

(*s*) See a recent Paper on Wilson's History of British India, in the *Tablet*; (Vol. VI. pp. 179—80.)

(*t*) Sheringham; "de Anglorum Gentis Origine;" Cap. XIII. pp. 277—8, 313.

(*u*) Fifth Report of the Commons' Committee of 1812, on East Indian Affairs; App. p. 723.

Attention which hardly any Man could give, till the Completion of such a Work, independently of innumerable Variations that would take Place while it was in Hand. It would be unwise, because, not only it would be ever the most beneficial Mode of Administration, in every Village, to deal jointly with the Inhabitants at large both with a View to Security and to good Cultivation, but because to tax them separately would tend to create Divisions and Dissensions, to the undoubted Embarrassment of themselves as well as of the Public. No Difficulty occurred in fixing the Value of all the Lands together in One Village. But it would be nearly impossible to assign to every small Allotment its Position so exactly, and with such due Regard to Fertility of Soil, and other Circumstances, that some should not benefit, while others suffered. Yet the latter would not receive the Assistance of the former, in Case of Failure in their Engagements.

At present, he says, every Village considers itself a distinct Society, and its general Concerns the sole Object of the Inhabitants at large. A Practice surely which redounds as much to the public Good as to theirs; each having, in some Way or other, the Assistance of the Rest. The Labours of all yield the Rent; they enjoy the Profits proportionate to their original Interest; and the Loss falls Light. It consists exactly with the Principles upon which the Advantages are divided by a Division of Labour. One Man goes to Market whilst the Rest attend to the Cultivation of the Harvest. Each has his particular Occupation assigned to him, and insensibly labours for all. But, if each had these several Duties to attend to, it is obvious that all the Inhabitants must be absent together, at those Times that are most critical, both to them and to the State,—and that many must want those Abilities, necessary to the Performance of the various Employments that would arise.

If a Measurement of Lands should be made, with a View to assign to each Proprietor what belonged to him, and to confine him to the Cultivation of that Spot only, it would interfere with another Practice, which very frequently prevailed, and which he thought could not be surmounted, of each changing his Lands every Year. It was found in some of the richest Villages, and intended, it was imagined, to obviate that Inequality, to which a fixed Distribution would be liable.

On the whole, he considered, that any Reform, tending to do away with the Union, or rather the Unity, of the Inhabitants, and to fix each exclusively to his Property, would be attended with Danger. Every Man's Right and Place was well known among themselves; and the Customs to which they were attached, were, as he had before said, necessary to their Contentment and Confidence. If it should be observed that they gave way to Intemperance and Abuse, it was to be answered, that the Superintending Authority placed over the Inhabitants, whilst it assured every Man of the Redress of his Wrongs, encouraged him to know his Rights. If he complained, Enquiry was instituted; and, if he did not, it was fair to conclude he was contented, and received Justice among his Associates. For it was hardly possible to conceive a Man, to whom Property descended, labouring under such a Degree of Ignorance, or so destitute of Friends and Relatives, that he would be egregiously imposed upon;—since neither an Idiot nor a Lunatic could inherit landed Property;—still less if he succeeded to it by Purchase, which argues sufficient natural Understanding to know if he received his just Dues.

I cannot do more at present than to direct and recommend to you, most seriously, the Study of India, its Manners, Laws, and Constitutions. Mr. Elphinstone's, and Professor Wilson's admirable Histories of India, with Mr.

Galloway's valuable Treatise on its Laws, but, above all, Mr. Urquhart's Spirit of the East, will best assist you in the Prosecution of those Enquiries. The past and present State of your own Country will suggest the Application.

I return to the Matter, from which I have, for a Moment, digressed.

The Assessment having been made, and the Money levied,—if it appeared that One were rated too high, or another too low, there issued out of the Exchequer, upon Complaint, a Writ *ad æqualiter taxandum*; by which the proper Officer was commanded to afford the requisite Relief (*x*). In the Eighth Year of King Edward the Third, such a Writ is recorded to have been issued for the whole County of Somerset (*y*). On their Side, the Community were not without their Remedy, where Contribution to a lawful Tax or Duty was unjustly withheld. They might seize the Goods and Monies of the Defaulter (*z*); or they might proceed by Bill, or Petition, in Equity, for compelling Contribution. Of such a Suit we meet with One probable Instance so late as the Reign of Henry VI. (*a*).

In the Writs of Levy, an Exemption was always made in Favour of Persons not being of a certain Substance. But there were more important Exemptions; which were always implied even where not expressed. If the Grant had been made upon Conditions, the Levy could not be proceeded with until those were fulfilled. If the Conditions, or the Violations of such, were but partial or local in their Character, so was the Respite—and the Levy, whilst

(*x*) 2 Inst. 77.

(*y*) Year Book 11 Hen. IV. f. 35.

(*z*) Heyburn v. Keylow; Mich. 14 Edw. II. B. R. Rot. 60. -

(*a*) The Bailiffs of the Guild of the Craft of Weavers v. Cokenage and others; *apud* II. "Calendars of Proceedings in Chancery in the Reign of Queen Elizabeth;" (Preface, p. xiii.)

it went on elsewhere, was suspended in the Locality, in Respect of which the Conditions had not been performed (*a*). If any of the Knights or Burgesses, Delegates, had not received from their "Communities" Power to concur in the Grant, their Vote bound themselves indeed, but not those "Communities."

A Subsidy of an extraordinary Nature was once demanded by Edward III. in Parliament, for the necessary Defence of the Realm. But the Commons answered, "that they would not dare to assent, till that they had counselled and advised with the Communes of their Country" (*b*). And this, says Lord Coke, is a Law and Custom of Parliament (*c*).

Hence, when the King summoned His Lieges to Parliament, it was no unfrequent Precaution to set forth, in the Writ of Summons itself, the Importance of the Knights, Citizens and Burgesses being furnished, by their respective Communities, with ample Powers to bind them by their Votes,—“so that the Business might not fail for Want of such Authority.” It should be mentioned that this is, in Fact, the Form of the Writ of Summons now universally in Use. The Members are to be elected, to consult “touching weighty Affairs of the Realm;” and they are required, “to have full and sufficient Power, for themselves and the Community, to do that which, of common Counsel, shall happen to be ordained in the Premises; so that, for Default of that Kind of Power, the Premises aforesaid may not remain undone.” The Indenture annexed to the Return answers to the Writ, and sets forth, that the Member has been elected,—“to attend according to the

(*a*) I. Rot. Parl. 8 Edw. II. No. 18. App. p. 449; I. Parl. Writs, pp. 104—5 (48); II. Parl. Writs, Div. II. p. 41 (18).

(*b*) II. Rot. Parl. 13 Edw. III. No. 8. p. 104.

(*c*) 4 Inst. 14, 34.



Tenor of the Writ,"—and that he has been invested with "full Powers to act in, and consent to, all Things in the said Parliament, which shall be of common Counsel and Consent ordained, touching the State and Defence of Her Majesty's Realm."

If the whole Shire, or Borough Court, had not concurred in the Election of its Knight or Burgess,—or if there had been a similar Want of Unanimity, touching the Grant of the Aid demanded,—the Dissentients were not lawfully bound, by the Suffrage of the Delegate, to render any Contribution(c). The whole "Community" was never bound, where the "Jurors" were not unanimous,—whether their "Verdict" related to judicial Proceedings,—(and, to the Validity of such, at this Day, the Unanimity of the Twelve Men is still valued as essential),—or to the Administration of any other Branch of public Affairs. On this Head, the following very interesting Authority deserves your Notice.

Upon the Scottish Invasion of the Bishopric of Durham, in the Reign of Edward II., the "Community" of Durham, whereof the Plaintiff was one, agreed amongst themselves to compound with the Invaders, for Money, to depart; and all of the Community, and amongst them the Plaintiff, were sworn to perform the Composition, and what Ordinance should be made in Furtherance thereof. So they compounded with the Scots for Sixteen Hundred Marks; and they agreed that the Defendant and Others should, for avoiding Delays, go into the House of every Man of the "Community," and search there for Monies to make up the Sum, and that such Monies should be repaid afterwards by the "Community." Thereupon the Defendant entered the Plaintiff's House, and took Seventy Pounds, which was paid towards that Fine, and for which the Action was

(c) First Report of the House of Lords on the Dignity of a Peer; pp. 65—6, 84, 93—4, 100—3, 134, 209—10, 226—7, 251, 286—7, 459, 471, 473—7.

brought. The Jury were asked, whether the Plaintiff was present, and consenting to his Monies being so taken? And they said, no. Wherefore the Plaintiff had Judgment to recover back the Seventy Pounds. But, upon Writ of Error brought from that Judgment in the King's Bench, and Error in Law assigned, the Judgment was reversed—because the Plaintiff had agreed to the Ordinance, and was sworn to perform it; and because the Defendant had done nothing, but by the express Consent of the Plaintiff, and therefore was no Trespasser. And it was said that the Plaintiff had no Remedy, but against his "Community" (*d*). If therefore the Owner of the Money had not particularly consented to the Ordinance made by his Community, it would not have bound him; and he would have been entitled to Judgment.

Thus too the City of London successfully refused to render the Fifth, granted to Edward the First, by the Council in the Twenty-Fifth Year of His Reign, and ordained by the King's Writs to be levied. Thus again, although the Grant of that Fifth was by a subsequent Compromise, and in another Council, commuted for a Ninth, the same City of London, not being present at the Compromise, was not bound by it; until subsequently, a special Grant was obtained from the Mayor and Commonalty, and annexed, by Way of Schedule, to the Charter (*e*). On another Occasion, the same King forebore, for Twelve Years, from levying an Extraordinary Aid; because it was granted under an Authority that was not clearly ascertained to be legally binding upon the Community (*f*). In the Reign of His Son, we find it recorded, how that a certain Shire Court refused to render Obedience to the

(*d*) Heyburn v. Keylow; Mich. 14 Edw. II., B. R. Rot. 60.

(*e*) I. Rot. Parl. 25 Edw. I. No. 11, App. p. 240. Lords' First Report, pp. 222—7.

(*f*) Lords' First Rep. p. 203.

King's Writ for the Levy of a Tax, on the Ground that, by Reason of Tenure, (their Lands being Gavelkind,) their Constituents were not bound to contribute (*g*). Even the final Sanction by Edward the First of the Statute of Quia Emptores,—although no Matter of Supply—waited till the Concurrence of all the Knights of the Shires that had been summoned could be obtained (*h*).

It was not until long after it had become the settled Practice to summon to Parliament the Delegates of the "Communities," (or "Commons" (*Communes*) as they began to be called,) that this Independence, this distinct Character, of each separate Community, was lost. The "Knights, Citizens and Burgesses" might vote the Supply, the "Greater Barons" assent to the Levy, the "King" by Writ command it. But the Franchises of the "Township" and the "Hundred" and the "Shire" subsisted; and their Mandatories had no Power to depart with these, even "*hac Vice*," in Favour of the Monarch. The "Lords and Commons" of Parliament could bind themselves, indeed, but not their Communities; further than was expressed by the Interposition of that saving Clause in every Grant, "*quantum in ipsis est*" (*i*).

But, when the Concentration of all those violated Powers became the Object of a constant and undivided Endeavour on the Part of Sovereign and Subject, then the Independence of each began rapidly to decline, the Balance of the Constitution to be displaced, the King in Parliament to obtain an undue and increasing Influence. When Edward III. ascended the Throne, new Ideas of Dignity and Rank had already come to attach themselves to the Place of Parliament Man. The Posts of Knight, Citizen and Burgess, once shunned as burthensome alike to Electors and Elected,

(*g*) II. Parl. Writs, Div. II. p. 91 (50).

(*h*) Lords' First Rep. p. 201.

(*i*) Lords' First Rep., &c., pp. 200, 1.

began to be valued, at least by the latter, for the direct Occasions which they offered of political Aggrandisement. In the Twelfth Year of Edward the Second, an Instance is recorded, where, after a long and industrious Opposition to the Parliamentary Writ, a Dignitary succeeded in making out his Claim to Exemption from sitting in Parliament (*k*). Yet, in the same Year, an Instance, perhaps the earliest Instance, of a contested Election, and of a Petition by the unsuccessful Candidate, praying to be declared the sitting Member, on the Ground of Illegality and Fraud, is also recorded (*l*). Five Years afterwards we meet with the Presentment, by the "Jurors" of West Derby Hundred, of a certain Sheriff of Lancashire, for having elected the Two Knights for that Shire, without the Assent of the Communitas or Shire Court; although that Court might have easily gotten Two substantial Men, of its own Election, and at much lower Wages (*m*).

Still it was not till the Reign of Edward the Third that Parliamentary Doctrines made much Progress; and even of that Progress the Traces are not easily discoverable if examined in the Sense of Modern Times (*n*). Contemporaneous and commensurate with the Progress of Ambition ever since has been the Decline of every Description of local Administration. One by One the Barriers to Usurpation, those Checks upon Misgovernment, have been practically abandoned; and although they retain their Legal Existence, and therefore their Value, we affect to consider them as obsolete.

So late indeed as 1645, "John Bigg," the "Maior" in

(*k*) II. Parl. Writs, Div. II., p. 199 (47).

(*l*) *Ib.* (Appendix), p. 138 (41). The Seat was for the County of Devon, and the Petitioner was "Matthew de Crauthorne."

(*m*) II. *Ib.* p. 315 (89), 17 Ed. II.

(*n*) XII Ann. Reg. (Characters); p. 152. XXI. Ann. Reg. p. 159, (Antiquities).

the Name of our "City of Bath," had to make humble Application to "our much honored and worthy Friend, I. H., Esq."—"hoping he will accept the Trouble of being their Burgess in this present Parliament." And the Election took Place accordingly;—although "he desired to be dismissed from serving,"—and "expended about *iiijs.* in Strong Beer and Metheglin, "in order to get excused;—but could not;"—and so was elected. It is mentioned also that, out of the 4*l.* "his Father gave him to bear his Expences at Bath," he "laid out in all, 3*l.* vii*Sh.* for Victuals, Drink, and Horse Hire, together with divers Gifts." But of such frugal Reluctance there were then rare Instances; and this, while it shows an Unwillingness in the Deputy to serve, displays also a great Ambition in the Jurisdiction to be represented, in Parliament.

The further we advance we shall find a more general Convergence towards One Centre. Institutions, which had withstood the King and His Barons, now yielded to the Third Estate. They were useless Clogs upon the energetic Ambition of their Delegates. The Battle of the Constitution was thenceforward to be fought within the Walls of Parliament; just as, at a still later Stage in the March of Improvement, the Battle Field has again been changed to Registration Courts. The Lower House was to become the Champion of the People. The Churl acted unwisely, and even ungenerously, who, to preserve his own paltry local Liberties, would cramp and embarrass the Endeavours, which so many Knights, Citizens, and Burgesses were honorably making, to establish, as they said, the Liberties of all England, by establishing, as they did, the Ascendancy of Parliament in England, and of their own Estate in Parliament. The Endeavour succeeded. The Local Liberties, though not annulled, have been suffered to become obsolete and forgotten. The Sacrifice has been made. How has

it profited the Churl, who made it? Whilst Local Administration remained, Pauperism was unknown. Each Hundred maintained its Poor, and was adequate to that great Duty. Notwithstanding that, in many Districts, the Soil was thinly peopled, the Instances of Death from Want were still so Rare, that, when they happened, they produced in the Minds of Men, not their barren and useless Pity for the Fate of the unknown Wanderer, but a deep Sense of the criminal and inhuman Neglect of that Hundred, where, from the Finding of the Corpse, the Death might be supposed to have happened. Such an Event was always then a Matter of Judicial Enquiry. If the Death appeared to the Jurors to have been really the Effect of Want, they made their Presentment, as in other Cases of Murder, and the Hundred was mulcted in the Murder Fine (*p*). These were their only Poor Laws! How far the Happiness and Prosperity of the Churl have been since promoted, by that Transfer of Powers, which deprives him of his proper Burthen of Solicitude for the Welfare of the State, let the Poor Law Amendment Act, Corn Laws, Chartism, and the whole Aspect of this Empire in 1845, make Answer.

In another Country, but in your own Time, you have witnessed the like Sacrifice of Time-honoured Franchises, to the Interest of concentrated Power. What Greece (even Modern Greece) was, whilst She continued to preserve the sacred Institutions derived from the same Sources with those of Her Amphictyons—(and these, even to their sacred Duodenary Numbers, were faithfully preserved,) you may best gather from your melancholy Knowledge of what Her Fate has been since She has lost them. The Change has been sudden indeed. Until 1828, those Institutions were still in Existence.

(*p*) I. Curia Regis, Introd, pp. XXXIV—V., and pp. 159, 162—3, 202—3, 210.

Those of Thessalian Chalcidice, as described by a great modern Writer, are so identical, in Form and Substance, with those of Greece Proper, that I cannot do better than quote from his clear and Succinct Narrative (q).

"The Conditions, [upon which the Franchise was holden,] appear to be settled thus;—the District to pay a certain Weight of Silver, which, at a later Period, amounted to Five Hundred and Fifty Pounds, and *Twelve principal Boroughs* to form an Administration of their own; having subordinate to them Three Hundred and Sixty Villages.

"Their Treaty with the Porte bound them to Obedience to the Madem Emins, (the only Turkish Authority, and indeed the only Turk that could reside in their District,) in Matters of civil and correctional Police; but stipulated entire Emancipation from all Interference with their internal Administration. The Payment of the stipulated Quantity of Metal discharged them from *all other Government Imposts*, and from Spahilic; (*Contribution to the Military Chiefs*;) and, for their Caratch (*or Poll Tax*), the Community compounded with the Collector of the Pachalic: But the District, and the Turkish Governor, were rendered independent, both of the Pacha and the Mekkiameh (Judicatory) of Salonique.

"As for their internal Administration, that of each Village was, of Course, the Municipal System prevailing throughout the Country. The General Representative System, adopted in the Mining Districts, was perhaps an Imitation of the Monastic Administration of Mount Athos.—A Central Committee was formed of the Deputies from the Twelve Boroughs. Each Subject of Discussion was debated by the different Municipalities separately. If the whole Committee did not agree, the Members returned again to the Municipal Bodies to re-argue the Question; as it was necessary for them to be unanimous upon every Mea-  
(q) "Turkey and its Resources;" by David Urquhart; pp. 63—6.

sure. To secure this Unanimity, no Decision was considered valid without the Seal of the Committee; and that Seal was formed of Twelve Copartments, One of which was entrusted to each Municipality. These Portions had to be united before the Seal could be used. The Unanimity, required in the Decision of the Committee, is conclusive as to the Purity of Election; without which, such Unanimity could never have existed, as to have allowed the Seal to be used at all (q). Each of the Twelve Boroughs had a certain Number of these Villages attached to it; and these Corporations were represented in the Boroughs on which they depended."

The Period of Grecian History, to which the next Passage relates, occupied but Four Years; from 1822 to 1825, both inclusive. The Analogy between the Rise of the Commons' House of Parliament, and that of the National Assemblies of Epidaurus, Astros, and Argos, was too remarkable not to be cited. I quote from the first Number of the valuable Series of Papers by Mr. Parish, entitled, "Narrative of Affairs of Greece" (r).

"The intellectual People, nurtured under a Municipal System, which gave them a practical Education, had already (in 1825) called together Two National Assemblies. No Difficulty had arisen with Respect to Laws of Elective Franchise. Under the Turkish System, the whole political Organisation of Greece rested on the Union of Families. Once a Year, throughout the Country, every Village, Town, and District had its Representative Assembly; in which the Heads of Families, meeting together in the Church, elected their annual Magistrates, examined the Acts and Accounts of the past Year, nominated their own Demogerontes, or

(q) "Amongst the Islands it was customary to have the Common Seal formed of as many Copartments as there were Burghs in the Island."

(r) "Portfolio;" Vol. III. pp. 222—5.



Municipal Authorities, for the ensuing Year, and apportioned out the Contributions required by their Turkish Governors. Under this natural Form of Government, the Greeks had attained, by the simple Force of Circumstances, and by public Opinion, Customs, which superseded the Necessity of Laws. The National Assemblies, therefore, of Epidaurus, and of Astros, were the natural Representation of the whole Country, and were only called together to concentrate the Powers of the Nation. Accordingly, we find the Greeks, aided by their practical good Sense, forming a Constitution, calculated to draw forth a Blush on the Cheek of Nations, that call themselves civilised, and denounce the Subjects of the Ottoman Porte as Barbarians. Unlike the boisterous Manner of conducting Revolutions and Reforms in Europe, the Assemblies of the Greeks, until European Intrigue came to interfere with them, were conducted with Calmness, Steadiness and Unanimity."

In the Year 1829, the Russian Capodistrias summoned the National Assembly of Argos. That the Constitution of this Assembly was precisely the same with that of its Predecessors, is plain from the following Passages in Mr. Urquhart's Work, already cited (s).

"It was curious to observe, at the Election of Members of the Assembly at Argos, how deeply implanted in the Minds of the Greeks was the Principle, of the Members being Mandatories of their Constituents. The Vote of the Members was looked on as the Vote of the District. It is true, Capodistrias sought to convert this Feeling into a Tool for Party Purposes; but it never originated in his Suggestions. The Fears of the People were aroused by the most insidious Means.—Their Virtues and their Vices were alike worked on. They were led to suspect Treachery from their Members; and a Coalition of the Primates and Capetani

(s) Turkey and its Resources, pp. 64—5, in *Notis*.

against the Central Government. So that they drew up,—in some Places,—the Conditions ; according to which they empowered the Members to vote, and exacted the most solemn Promises (*t*), for the Observance of these Conditions ;—in other Places,—declared they would ratify no Decisions in Opposition to their Instructions ;—and,—in some Cases,—even threatened to burn the Houses of their Deputies, and hang them themselves, if they betrayed their Trust ! Does not this forcibly recall the Deputies, carrying their Instructions to the Amphictyonic Assembly,—making their Report on their Return,—depositing Copies of the Acts,—accounting for their Votes,—and requiring—to make these valid,—Ratifications of the *γερονσια*, and the *εκκλησια*, of the Constituent City ?”

But, although the Principle of Delegation was, as we have already seen, established under the Conqueror and His Successors, it was not employed for the Regular and Permanent Concentration of Powers, until the Reign of Edward the First ; and it did not efface the Local Jurisdictions until a much later Period. We continue to meet with the Local Witan, in the assembled Representatives of a few Shires, sitting all apart from the Great Witan of the Realm, and these—in the Name of their Constituents—treating with the Monarch. We meet with the “*Communitas*” of Yorkshire, in “*Shire Court*” assembled ; voting Supplies of Men and Monies, which the Parliament of Edward the Second had not voted, nor the Realm bound itself to give. We read of similar Grants, in His Reign, and in that of His Father, by the “*Communities*” or *Shire Courts* of Northumberland, Lincoln, Flint, Salop, Hereford, and other Shires,—of the Lands of Bowelt, Montgomery, and “*Powis Griffyn*”—and of “*North Wales and West Wales* ;”—and each

(*t*) So did the Old English Electors ; and hence their Representatives were called “*Jurors* !”

Court contracting for itself, and independent of all others,—and all stipulating for themselves, or receiving the Royal Assurances, that such Acts of Loyalty and Love should not be drawn into Precedent to their Disadvantage (u).

It was even long before the “*Thanes of the Hundred*,” or “*Minor Barons*,” ceased to give their personal Attendance in the Council of the State, when Emergencies demanded it. The following Instance is particularly deserving of Notice. It shows, that the “*Four Men and Reeve*” were not only still considered to be the true Representatives of the Township, but also, that, in that Capacity, they were liable to be summoned, by the Sheriff or Viscount of their Shire, to the Grand Inquest of the Realm. In the Anglo-Saxon Time, although their Attendance there was constant, yet they were not summoned to attend.

In 1213, (Two Years before the famous Assembly of Runnimeade,) King John made submission to Archbishop Langton, and received his Absolution at Winchester. In receiving that Absolution, the King swore upon the Holy Gospels, to love, defend, and maintain, Holy Church and Her Ministers, against all Her Enemies, to the utmost of His Power, to restore the Good Laws of His Predecessors, and specially King Edward’s Laws, and unjust Ones to destroy, and to judge all His Vassals by the just Sentence of His Court (*Curia*), and to render unto every Man his Rights. Also He swore, on Peril of His former Excommunication, to make full Restitution, by the following Easter, of all the Extortions for which He had incurred the Interdict. Therefore, on the Morrow, the King sent His Letters to all the Sheriffs of the Realm of England, commanding that of every Vill or Township of His Demesnes they should cause the “*Four Lawful Men, with the Reeve*” to meet

(u) II. Parl. Writs, Div. II. pp. 16 (5), 408—10 (40), 414, 628—35, et passim. Rot. Pat. 28 Edw. I. M. 6. 5 Edw. I. M. 22.

Him at St. Alban's by the Month of August ; so that by them, and other His Ministers, He might make Inquisition, and ascertain, touching the Injuries and Extortions suffered by every of the Bishops, and how much was owing to each. The Council met accordingly ; the King's Justices, Geoffry Fitz Piers, and the Bishop of Winchester, presiding in the King's Absence beyond Seas. Thither came the Archbishop of Canterbury, and the Bishops, and the "Magnates," or Great Men, of the Realm ; and the "Four Lawful Men and Reeve" came, in Obedience to the King's Writ, from every Township. At that Council the King's Peace was proclaimed unto all Men. On the same King's behalf it was firmly commanded, that the Laws of His Grandsire Henry should be kept by all Men throughout His Realm ; and all unjust Laws utterly avoided. Moreover it was signified, unto all Sheriffs, Foresters, and other the King's Officers, that, as they tendered Life and Limb, from no Man were they to extort by Force anything ; neither presume to do Wrong unto any Man ; neither to set up Ale Shots (Scotalla) (*x*) in any Part of the Realm ; as they were wont to do (*y*).

In these Proceedings there is little that offers any Analogy to the ordinary Pastime of modern Parliamentary Members. Neither should this be wondered at. The Great Council of the Realm was in those Days the Remedial Court of the whole Realm. Its Province was Administration of the Law, not Law Making. The Control over Taxes and Expenditure, the supreme Direction over

(*x*) These were Ale Houses ; which the King's Officers were wont to set up in His Forests, and compel Customers to resort thither under Threats of their Displeasure. In modern Times, the Truck System has revived this Abuse ; but in a much more general and oppressive Form.

(*y*) Roger de Wendover, Vol. III. pp. 261—2.

Public Affairs,—Civil and Military, at Home and Abroad, —and the Dispensation of Justice between Man and Man, between Prince and Subject, where the Rigour of the Common Law denied Relief, were the proper Functions of an Assembly in which the King or His Justitiary presided. Legislation was but a secondary Concern ;—or rather it resulted from the Judicial Occupation, and was resorted to only in Cases where the existing Law was silent or ambiguous. Yet, even then, it more resembled that which we now call Declaratory Legislation, as distinguished from Enactment. It professed to proceed, from old and acknowledged Principles, by a regular and logical Deduction, to their Equitable Application to Cases otherwise not provided for. There is not one of the earlier Statutes to which this Observation is not strictly applicable. They were rather Judgments than Statutes, in the modern Acceptation of the Word. They bear a strong Resemblance to the Decrees of our Courts of Equity ;—with this Difference, that the latter possess a less extensive Jurisdiction, whilst the Equitable Jurisdiction of the Great Council pervaded every Department.

In the Times, says Madox (*z*), near after the Norman Conquest, there was but one supreme ordinary Court of Judicature in this Realm ; which was properly, and by way of Eminence, styled Curia Regis. By this Name it was distinguished from all other subordinate Courts.

With Respect to its Judicature, we may consider the King as Sovereign or Chief Lord of His Realm, and the Fountain of Justice to His Subjects ; residing in His Royal Palace, and attended by His Barons and Great Officers, both of the Clergy and Laity. The Liege Men of His Kingdom bring their Complaints or Causes before Him, as Supreme Arbiter and Judge, to be determined in His Court or

(*z*) History of the Exchequer, pp. 56, 58, 59.

Palace, wherein was the Seat of the Supreme Judicature. If the King, when He was present and sate in Judgment, did not determine all the Causes that were brought before Him, His Justicier or Justiciers determined the same. However, if the Justicier did not do right Justice, the Party might, as I take it, afterwards resort to the King Himself. He obtained Writs or Precepts, by Means whereof he pursued, and recovered, or settled his Right. Those Writs or Precepts were made out under the King's Seal; and, for the Making and Issuing of them, (and for other Services,) the King used to have, near His Person, or in His Court, some Great Man, who was called His Chancellor, and had the Keeping of His Seal. The Chancellor had under him certain Clerks, employed in making out those Writs. Whence it came to pass, in Process of Time, that, in Law Proceedings, the King's Chancery was the Spring or First Mover; and the Principal or Original Writs (for the Introducing of Causes) were called Writs of the Chancery.

Thus the whole Justice of the Realm was primarily and originally the King's, and His Court the Seat of the Sovereign Judicature.

"Who is it," demands Bracton (*a*), "that may and ought to have the First and Chiefest Place upon the Judgment Seat? Be it known, then, that it is the King Himself, and none other; if alone He suffice unto it; for thereunto, by the Power of His Oath, is He holden bound."

"All the Justice of the Realm is the King's alone;" says Spelman (*b*); "and, if sufficient for so great a Burthen, only by Himself to be administered."

In the Language of Mr. Madox (*c*), it is to be under-

(*a*) Bract. L. III. Cap. IX. Sect. 1, f. 107; *Ib.* L. III. Cap. X. Sect. 1, f. 108.

(*b*) Glossar. in Voce *Cancellarius*; p. 107, col. 1.

(*c*) Hist. of the Exch. p. 107.

stood, in general, that, wheresoever in England the King resided in Person, the Supreme Ordinary Judicature was there; especially when He pleased to appear in the Splendour of a Sovereign. In Truth, Judicature was, in a Sort, inseparable from His Royal Person. He administered Justice, "*ubicunque fuerat in Angliâ*;" either solemnly or unsolemnly, as He thought fit; either "*in Curiâ*" or "*in Itinere*."

Sometimes, as he remarks elsewhere (*d*), Litigants crossed the Seas, when the King was in foreign Parts, to lay their Complaints before Him. Many of the Fines, usually proffered and given, upon Account of Law Proceedings, were made with the King in Normandy, or in His Transfretation thither, or in some Parts of England, where He travelled or resided, at the respective Times of Fining.

After Pleas were brought into the King's Court, the Judgment given therein was deemed the Judgment of the King Himself. It was also called the Judgment of His Court; it being given or pronounced by the King, or His Justicier, with the Advice of His Barons and Great Men, Assessors in His Court. In the Case of Alfonso King of Castile, and Sanchez King of Navarre, when Judgment is given therein in the King's Court, it is styled in one Place (*e*), the Judgment of the Earls and Barons of the Royal Court of England; and, in the next Page (*f*), it is styled the Judgment of Henry King of England.

If the Cause was of ordinary Importance, it is probable that it was usually despatched by the High Justicier, or other Barons and Justiciers, who had Leisure from the King's other Business to attend upon it; but that, if it was of great Importance, it was considered and judged in a

(*d*) Hist. of Exch. p. 60.

(*e*) Hoved, P. II. p. 564, n. 50.

(*f*) Carta Henrici Regis. *Ib.* p. 565, nn. 30, 40.

fuller Assembly. The same Distinction governed the Principle, upon which the Functions of the Justices in Eyre were assigned. "Let the Justices," is the Language of their Commission (*g*), "do all Justices and Rights, that have Regard unto the Lord King, and unto His Crown ; unless the Plaint be so great that it cannot be despatched without the Lord King, or such as the Justices shall, from Doubts of theirs, refer unto Him, or unto them that shall be in His Stead."

"Let no Man suppose it," concludes Mr. Madox (*h*), "to be a novel Usage for Kings to sit, personally, in Judicature. On the contrary it is a very antient One, and conformable to the Law and Practice of Nations." And that learned Author then enumerates many striking Passages in Sacred and Profane History, which illustrate his Remarks. I shall not repeat them here ; being only too well contented to seize this opportunity of referring you to the admirable and too much neglected Work of Mr. Madox. But your own Classical Studies must have made you familiar with many other Instances. One very striking and parallel Instance occurs in the early History of Antient Rome. I may say, that it is quite a recent Discovery ; for, although we had some general Evidence sufficient to satisfy us that the Practice was such, in the Days of Servius Tullius (*i*), I do not remember that the Principle of the Thing is to be found anywhere so well set forth, as in the following Passage of Cicero, from the Palimpsest of Cardinal Mai (*k*).

"There was nothing so Royal as the declaring of Equity ; wherein consisted the Interpretation of Right. For Private

(*g*) Assis. Justic. Errant. Anno. 22 Henr. II. Hoved. P. 2, p. 549, *nn.* 40, 50.

(*h*) Hist. of the Exch. pp. 61, 65.

(*i*) Dionysius IV. 25.

(*k*) Cicero de Republica, Lib. V. S. II. f. 247 (p. 297).



Men were wont to seek their Right of Kings; and, for those Causes, there were Lands, Fields, and Woods;—and Pastures, broad and rich, were set out; which should be to the Kings; and which should be tilled without the Pains and Trouble of the Kings; so that no Care of private Business might withdraw Them from the Affairs of Peoples. Not every Man truly was Judge, or Umpire, of the Suit; but all Things were determined by Royal Sentences.”

It is an exact Counterpart of England, under Her Saxon and Norman Sovereigns. The King was the Great Asylum to protect the Weaker against the Invasions of the more Mighty. So that, says Mr. Madox (*l*), it became frequent and usual, for Men to bring their Complaints to the King's Court; where they found they could have Justice, when they could have it nowhere else: a better Justice and Relief than they could have elsewhere. And the King's Court was open to Complainants.

When the miscellaneous Business of the King's Court had so increased, as to be perplexing and impracticable, alike to the Officers and the Suitors, the Division of that Court into distinct Departments took Place. It was, in Fact, precisely the same Change, and from the same Causes, which is recorded to have taken Place in the Monarchy of Old Rome. Servius Tullius was the First Roman King, who departed with so much of His Judicial Prerogative, as to delegate to inferior Magistracies the Cognisance of private Suits between Man and Man, in certain Cases; still reserving to Himself the sole Jurisdiction in Criminal Cases, or where the Commonwealth was immediately concerned (*m*): This was the very Method of the Changes that took Place in England under the Plantagenets. Pleas of the Crown, with Common Pleas, in the First Instance, or Pleas between

(*l*) Hist. of the Exch. pp. 61, 65.

(*m*) Dionys. IV. 25.

Subject and Subject, were continued to the Curia Regis; and Pleas of a Fiscal Kind were transferred to the Exchequer. Afterwards, the increasing Arrear of Business from the King's Court made further Changes necessary; and to that Court, under its present Name of King's Bench, Pleas of the Crown were exclusively reserved; and a new Committee of that Court, but separate from it, permanently established, under the Name of the Court of Common Pleas, for the Trial of Pleas between Subject and Subject. This last Change was effected by Magna Carta. In what Way the Courts of King's Bench and Exchequer have each regained a co-ordinate Share in the Civil Jurisdiction, which, on that Occasion, was given to the Court of Common Pleas exclusively, it forms no Part of my present Undertaking to enquire. Suffice it to say, that that Restoration came to pass long after the Period of which I am speaking, and was owing to peculiar Causes, which are quite foreign to our Purpose.

For the Chancery, or, to speak more correctly, for the King in Council or Parliament, were still reserved all Pleas not appropriated to the other Courts; the Fountain of Justice and Equity being always held to be in the Sovereign; Who, by His Coronation Oath, had bound Himself to dispense unto every Man "equal and righteous Justice." The other Courts were limited by the general Character of their Maxims, coupled with the particular Circumstances of the Application; and Cases continually arose, which admitted of no proper or adequate Remedy, by the ordinary Course of Practice. But the King had ever the Power of affording Relief in all such Difficulties; and, for it, Recourse was had to Him, in His High Council or Parliament (n).

In Process of Time, that Assembly became in like Manner,

(n) I. Rot. Claus—Intro. pp. XXII. XXVI.

incompetent to support the increasing Pressure of Business. Again the King owned Himself to be "wholly insufficient, in His proper Person, to hear and determine all the Complaints of His People (o) ;" and again a Remedy had to be provided. Gradually therefore, the more numerous but least important of the Petitions, addressed to the King in Council, were handed over to the exclusive Jurisdiction of the Chancellor. This necessarily involved the Separation of the Chancery from the Parliament, and the Erection of the former into a separate Court of Judicature, for the Determination of Plaints, "*secundum Æquum et Bonum.*" The Statute of the 8 Ed. I., hereafter cited, is Evidence to show that, so early as that Period, the Separation in Question had become complete; and that, notwithstanding that Circumstance, the King in Council continued to retain, and to exercise, by far the most important Part of His Judicial Functions. If the Chancellor could administer Relief, without the King, it was so to be administered. But, if the Petition were of such Importance, or "of such Grace and Favour," that it could not be despatched but by the King Himself, then it was to be brought before the King in Council, "by the Hands of the Chancellor," to abide His and Their Decision (p). And this Arrangement has ever since subsisted, without further Alteration, down to the present Day.

The Queen remains ever "the Fountain of all Justice, and the Life of the Law," to all Her Subjects (q). The meanest of them shall not fail of Right, for Lack of Remedy. If Her Ordinary Courts deny him Relief, or are incompetent to confer it, it is only where, upon that very Ground, Her Prerogative of Justice and Grace empowers

(o) Britton, fol. I. a.

(p) I. Rot. Claus. Introd. XXVII. XXVIII.

(q) Co. Rep. (Title Page.)

him to approach Her Royal Person, immediately, by Petition. To this grand Maxim of Law there is no Exception, neither of Person nor of Place,—of Subject Matter nor of Epoch. On this Point the Language of the Records is unequivocal. It was solemnly “declared and enacted” in Parliament (*r*), to “all Men soever,” who should feel themselves aggrieved by the King or by His Ministers, or other,—“let them set Petitions forward, and they shall have good and convenient Remedy.”

The mode of Setting Petitions forward was regulated by the Statute of Edward the First; “Of Petitions in Parliament” (*s*).

“For that because the Folk which come to the King’s Parliament are oftentimes delayed, and disturbed, to the great Grievance of them and of the Court, by the Throng of Petitions which are put before the King, whereof the most might have been dispatched by Chancellor and by Justices; It is provided, that all the Petitions which touch the Seal do come first to the Chancellor, and those which touch the Exchequer do come to the Exchequer, and those which touch Justices or Law of Land do come to Justices, and those which touch Jewry do come to the Jewry’s Justices. And, if the Businesses be so great, *or so much of Grace*, that the Chancellor, and those others, cannot do them, *without the King*, then they shall bring them, *with their own Hands*, before the King, to know His Will. So that no Petition do come before the King and His Council, but by the Hands of the aforesaid Chancellor, and the other Chief Ministers. So that the King and His Council may, without Charge of other Businesses, intend unto the great Businesses of His Realm and of His Foreign Lands.”

(*r*) II. Rot. Parl. 15 Ed. III. No. 5, p. 127.

(*s*) 8 Ed. I. printed in Ryley’s *Placita Parliamentaria*, p. 442.

This Law being made, observes Lord Somers (*t*), there is Reason to conclude, that all Petitions, brought before the King in Parliament after this time, and answered there, were brought according to the Method of this Law; and were of the Nature of such Petitions as ought to be brought to the Person of the King. And that this was so, appears the more probable, from an Ordinance of the same King, which the Lord Keeper seems to have overlooked; and made Eight Years afterwards, for the better effecting the Objects of the Statute (*u*).

“The King doth will and ordain, that all the Petitions which, from this forward, shall be delivered at Parliaments, unto them whom He shall assign to receive them, that all those Petitions be all at once, after that they shall be received, well examined;—And that those which do touch the Chancery be set in One Place severally;—And the others which do touch the Exchequer in another Place;—And let it be so done with those which do touch the Justices;—*and then those which shall be before the King and His Council severally in another Place.* And also those which shall have been answered before, in a several Place. And so let the Things be reported before the King, before that they begin to deliver them.”

The Chancery was only One of the Offices of Parliament. Thence remedial Mandates issued. There evil Ones were annulled or cancelled, by Authority of the King in Council, and by the Hands of the “Clerk,” or “Chancellor,” of that Department. His Name betokened his Office. According to John of Salisbury, writing in 1170 (*x*),—

“Hic est, qui Leges Regni *cancelat* iniquas,  
Et Mandata pii Principis *æqua* facit.”

(*t*) The Bankers' Case; xiv. How. St. Tr. p. 84.

(*u*) De Ordinatione de Petitionibus Parliam. 21 Ed. I. Printed in Ryley's Plac. Parl. p. 459.

(*x*) Polycraticon. (Compare the Argument in The Baron de Bode v. The Queen, Q. B. Hil. T. 1845. Printed Case; pp. 272—3).

In later Times, some Portion of the Judicial Authority, possessed by the Sapientiores or Concilium Regis, devolved, as we have seen, upon the Chancellor. But it was only a Portion. In Civil Suits between Man and Man, the Chancellor's present Jurisdiction is transcendant. But, while the Great Council of the Realm retained that in their Hands, it was not to civil Suits that their Jurisdiction was confined. That Symbol of equitable Prerogative, the Great Seal of England, was, indeed, always in the Keeping of the Chancellor. But he held it at the Disposal of the Sovereign in Council, whose Officer he was; and he used it only as They bade him, by Their Warrants duly and carefully attested (*y*). The smallest Matters were not too insignificant to receive the Sanction of the Great Seal, where those touched the welfare of the Community. In the Time of Henry the Second, the Wardrobe Accounts, and, until long afterwards, those of the Civil List, and Privy Purse, passed the Great Seal by Order of the Council. Gradually, indeed, the Chancellor became somewhat more than the Officer of that Body. In the Reign of Richard the First, he began to be a Depositary of the extraordinary executive Powers of the Great Council, particularly in the diplomatic or external Department,—subject only to its ultimate Control. Afterwards he became, in like Manner, invested with so much of the Judicial Functions of that august Body as he now possesses; those, namely, which respected Civil Litigation in certain Cases, amongst Subjects, and, occasionally, such also as related to Franchises, where the Charters were in Dispute (*z*). But it was not until the Reign of Edward the Fourth, that he claimed to act as the immediate Officer of the Crown, and “Vice, Nomine, et Loco Regis,” and no longer of the Parliament (*a*). Even at that Zenith of his Power, it was

(*y*) I. Rot. Claus. Gen. Intr. pp. xvii., xix.

(*z*) II. Parl. Writs, Div. II. pp. 279—81.

(*a*) I. Rot. Claus. Gen. Intr. pp. xxiij., xxv., xxvii., xxxi., xliv.

but a Branch, although an important One, that he had obtained, of the Judicial and Executive Functions of that High Court. And, for Centuries afterwards, the People still continued to attach to the Name of Parliament, howsoever degraded by later Associations, not only the Ideas of Equity and Relief, which ought still to appertain to it in its Political and Judicial Capacity, but those also which are now attached to the Court of Chancery alone. Long after the complete Establishment of that Court in its Equitable Jurisdiction, the familiar Speech of the Day preserved the Remembrance of the wider, more remedial, and more powerful Authority, whence it sprung. In defining their respective Jurisdictions, the very Judges continued to employ Language, which their Predecessors had employed,—and, in those remoter Days, with Propriety.

Thus, so late as 1692, Lord Holt, in commenting on his Inability, sitting at Common Law, to grant Relief under a purely equitable Title, observed (*b*), “Wherefore it would be convenient for the Heir to seek Remedy in Parliament, according to Moore, 784.” But the Case which he cited from Moore was One, where the “Remedy” was given upon Application to the Court of Chancery, in the Exercise of its ordinary Jurisdiction; and it does not appear that any Application whatever had been made to Parliament. The Inaccuracy is apparent; but only apparent. The Chief Justice of William the Third, spoke as his Predecessor in the Days of Edward the Second would have spoken. The Terms, Parliament and Equity, in his familiar Language, were convertible, and indifferently applicable, and denoted that Jurisdiction which was the great Rival of the Common Law. Once they had been synonymous, indeed; but that was in Days when Parliament was mindful of the highest and most solemn of its Functions,—the public Dispensation

(*b*) The King and Queen *v.* Lady Portington; 12 Mod. R. 31.

of Justice. Those were the Days in which it used to be written—and then was written well (c)—“let what Things ought to be redressed in Parliament be there redressed, and what Things do touch the Common Law, by the Law of the Realm be elsewhere redressed.”

Out of the numerous Instances of the Equitable Jurisdiction of First Resort, once exercised by Parliament, and since devolved to its Chancery, I cannot refrain from noticing the following Case, reported in the Statute and Close Rolls of the same Reign.

In the Parliament, which met at Westminster, in the Seventeenth Year of Edward the Second, a great Conference was held before the King Himself, touching the Claims of certain Lords to the Lands of the dissolved Order of Templars, as their Escheats. Thereupon,—the Great Men of our Lord the King's Council, being summoned, as well Justices as others of the Laity,—the Justices affirmed that the King and other Lords of the Fees held by the Templars, might, *by the Laws of the Realm*, well and *lawfully* retain the Tenements in Dispute as their Escheats. But, because they had been given for the Defence of Christians, and, for other Charitable Purposes, it pleased, and seemed to, the King, and the Magnates, and others there assembled, that the said Tenements should be assigned to other Men of Religion, &c. Whereupon it was agreed, provided, and ordained for Law, to continue for ever, that all the Lands, and so forth, which belonged to the Templars at the Time of their Dissolution, should be assigned and dedicated to the Order of the Hospital of St. John of Jerusalem. Whereupon the King, by the unanimous Consent of the Earls, Barons, and Proceres aforesaid, of the Plenitude of His royal Power, assigned the said Lands, and so forth, and desired the same to be delivered to the Order of the said Hospital, to hold to



them and their Successors, of the King and other Lords of the Fees, and by the same Services by which the Temple had held them (*d*).

The Principle of this Case continues to be recognised in Courts of Equity. If a modern Lawyer were to quote it, he would say, that there the Court held, that, although the Title of the Chief Lord was absolute at Common Law, Equity would still interfere in Favour of Charity; and that, it having become impossible, by Reason of the actual Illegality of the Objects, to carry out the Original Trusts, the Court would direct a *cypres* Application.

So long as the Parliament understood that the Judicial Character was its true and primary One, that Body, notwithstanding its new Name, was still the Great Council of the Realm. The Name, indeed, was a Forecast of bad Import, and, perhaps, a Sign of incipient Corruption. But as yet the Change had gone no further. Parliament was Council. Not as yet had it made itself that mere Thing, which, its Name of a New Coinage—(less appropriate then than now)—denoted,—an eloquent, but by no means a deliberative, Assembly!

The Conviction of the absolute Supremacy of Justice, not only over Tribunals where Controversies were liquidated, but over all the Concerns of Life, public or private, was at that Time deeply seated in the Bosoms of Englishmen. The Judicial Occupation was familiar to all. Law was then a Habit,—a “Custom;”—and Men could no more divest themselves of it, when they entered upon the Consideration of public Affairs, than when they sat in Judgment. “If we read the antient Rolls of Parliament,” says Pal-

● (*d*) Rot. Claus. 17 Edw. II. m. 14; 17 Edw. II. St. 2. (Authorised Collection of Statutes of the Realm, printed by the Record Commissioners).

grave (e), "we shall find that the Law was always before the People. The Petitions relating to the Administration of the Law comprise Nine-Tenths of those which are extant. The greatest Portion of the Business which now passes through the different Offices of State and Public Boards, was antiently transacted by the Courts of Law, and by the Law Officers of the Crown." Later Times have remarked a notable Distinction, that is said to exist between the Laws of the State and the Duties of Statesmen. It may have been reserved for the Times which are to follow ours, to discover a similar Distinction between the Laws of the Land and the Duties of Judges. Westminster Hall is still the Seat of Public Justice. But so formerly was Parliament. The Desecration to be apprehended is not more improbable than that which has been witnessed. I doubt whether the Improbability be not, in Fact, much less.

Those Judicial Habits of Thought admirably fitted the Great Council to discharge, in the Presence of their Sovereign, the Duties which belonged to them. The Imposition of Tallage, the Commission of Array, the Grant of Scutage, the Concession of the Aid or the Subsidy, were, all and each, solemn and deliberate Functions; which it depended not upon the Caprice of the Parliament or Monarch, but upon their common Appreciation of the Emergency, and their common Interpretation of the Law, to perform. It was not sufficient that the "Common Assent" was given to the new "Aid, Mise, or Prise," demanded by the Monarch, unless it were for the "Common Profit of the Realm," that Assent did not make it lawful (f). Even where legal as to Purpose, it did not follow that it would be legal as to

(e) Extract from Sir F. Palgrave's Report of Proceedings for the Year 1830—31; (*apud* Cooper's Account of the Public Records, Vol. II. p. 78. "From an unpublished printed Document").

(f) 25 Ed. I. c. 6. *Confirmatio Cartarum*.

Assessment. There were so many Grounds of Exemption. Some of them have been enumerated already. But there were others, founded upon Tenure, others claimed under Charter, others acquired by Prescription.

The Church had Her Franchises, which the King's Writs could not enter. The Votes of the Commons in Parliament affected not the Clergy; nor could their Bishops and Abbots, who sate among the Magnates, bind them, by their personal Assent to the Aid or Subsidy demanded. Unless the Pope Himself commanded the Grant, they had no Power to render it, except in Convocation, or,—during the Interval from the Reign of Edward I. to that of Henry VI.,—in Parliament (*g*). Nor were they to be convoked by the King's Writ. Whether they joined the Laity, or whether their "Estate" met apart from the other Two, their Presence in Parliament was yielded to the Summons of their Primates, whilst the Writ of the King was followed ever by their Protest of Exemption (*h*). Nor did the Archbishops of England venture to summon the Clergy of their Provinces, according to the King's Writ, until after Consultation had with their respective Suffragans (*i*). Even then their Concurrence was by no means a Matter of Course. One remarkable Instance is recorded of their unanimous Refusal. Edward the Second had demanded from the Convocation, which met at Lincoln in the Sixteenth Year of His Reign (*k*), their "Counsel and Aid," for the better Prosecution of His Wars in Scotland. Both Points were considered, and formed, at Length, the Subject of a bold and argumentative "Deliverance;" in which they requested the Primate's Leave to return to their Homes, having made up

(*g*) II. Parl. Writs, Div. II. pp. 100 (25), 101, 140—2 (5—14) App.

(*h*) *Ib.* pp. 123—4 (79—80), 139 (44), 282 (71).

(*i*) *Ib.* p. 236—7.

(*k*) *Ib.* p. 283 (74).

their Minds not to grant that Aid, because it was excessive, nor any Aid, but the One approved by His Holiness John XXII. "But, as touching the Counsel, it seemeth to the Religious and Clergy of the whole Province of Canterbury now present, to be a sound Counsel, that Our Lord the King, the Great Men, and all Proceres, do study, in the First Place, to commend them devoutly unto God and the Prayers of the Church, and do refrain them from unjust Exactions and Oppressions done upon the Church and Church Men, and upon the People, and do soften their Subjects' Hearts!" Then the King, being exceeding wroth, demanded the Names of them who had agreed to such a "Deliverance." But the Prelates and Clergy stood to it stoutly, and said that it was their unanimous "Deliverance;" being chiefly encouraged thereunto, adds the Narrator, by a political Writing or Libel, which One of them had found on the Floor of the Chapter House where they were sitting;—wherein the Vices of the Time, and the great Illegalities in the Conduct of the War, and their own especial Duties towards the State as Churchmen, were forcibly and pungently depicted. Wherefore the King's Envoys, seeing that nothing more was to be gotten, were fain to content them with what the Pope had granted;—and so the Convocation was dissolved (*l*).

(*l*) II. Parl. Writs, Div. II. pp. 283-4 (74—77). The following Document is a literal Translation of the entire Record:—

"The Deliverance of the Religious and Clergy, upon the Matters enjoined, unto the same, through the Lord Archbishop of Canterbury.

"Upon that which is enjoined unto the Religious and Clergy, that they do deliberate upon the Counsel and Aid to be given to Our Lord, the illustrious King of England,—the Wants and the imminent Peril of the same having been expounded,—it doth seem unto the Religious and Clergy of the whole Province of Canterbury, now present, to be a sound Counsel, that Our Lord, the Lord King, the Great

Many Barons, and others of the Laity, had, like the Men, and all the Proceres, in the Beginning, do unto God and the Prayers of the Church devoutly study to commend themselves,—and do, from unjust Exactions and Oppressions, upon the Church and Ecclesiastical Persons and the People inflicted, desist, and do soften the Hearts of their Subjects. As to the Subsidy, on the Part of the said Lord King demanded,—they do unanimously make Answer that, since Our most Holy Father and Lord, the Lord John, by Divine Providence, Pope the XXII., having attended unto and weighed the Causes and Reasons; on the Part of the said Lord King now expressed, willing to provide for them, out of a sufficient Subsidy, so far as the Means of the Anglican Church be adequate, hath granted unto the same a Tenth for Two Years,—it is not lawful unto the Religious nor unto the Clergy,—neither are they able,—beyond the Grant thereof, without Offence and Contempt of the See Apostolic, to grant anything this Time; since that Charge, already imposed by the said Lord Pope, is to Ecclesiastical Persons, grievous and unbearable unto many; as well because of the Failure of Fruits of the instant Year, and of others preceding, as because of the Dearth that is imminent, and will become more grievous, as is reasonably dreaded, and also because of divers and unwonted Loans, and other not unknown Grievances, which the Religious and Clergy aforesaid have hitherto suffered. Unto You, therefore, Reverend Father and Lord, Lord William,—by God's Grace Archbishop of Canterbury, Primate of all England,—the Religious and Clergy of Your Province of Canterbury, in this Congregation present, this their Deliverance exhibiting, humbly beseech and devoutly, that, after that the Premises, all and singular, have by You been weighed, if it so please You, with all Diligence, for the Support of the Religious and Clergy aforesaid, You do vouchsafe graciously to accept the same Deliverance, founded in the Truth, and mercifully to excuse, in this Behalf, the said Religious and Clergy with Our Lord King; and, the same Religious and Clergy having been oftentimes grievously and long wearied,—that You will, if it so please You, considering the Distances of the Places, and the Perils of the Roads, dissolve the present Congregation, and grant them Leave to depart."

This Deliverance having been made;—

"The Lord King,—moved unto Wrath by the Deliverance aforesaid,—sent certain of His own unto the said Council, desiring to know the names of the Consentients to, and the Dissentients from, the said

Church, their own Jurisdictions and Franchises, which

Deliverance. But the Prelates and Clergy stood to it, stoutly, saying unanimously, that 'it was the Consent of them all';—being encouraged thereto chiefly by a certain Cedula, found in the Chapter House of Lincoln, containing the Form which followeth.

"Counsel is demanded of the Clergy of the Province of Canterbury, for providing of Relief against the Scots,—Enemies of the King, and the Realm, and the Church, and all the People Anglican.—And would that they, who demand Counsel hereof, may have Regard both to the Needfulness, and the Cause of what there is to seek! For the Realm is in the Chance of Peril, unless God have Regard; even as the People are crying aloud; of the Causes within written. In the First Place, as it is asserted, many of the Great Men do err in the Faith Catholic;—in the Article, to Wit, of the Resurrection, and in the Sixth Commandment of the Decalogue. And, not to speak of other Things, God they fear not, their Neighbour they love not; Churches and Holy Places they do plunder and spoil; the Franchises thereof they break and violate; degenerate Sons, the Dame they do bring down to be their Handmaid, and from Mother do make Her into Stepmother; upon Church Ministers they do bring reproachful Sacrileges, undue Exactions they do exact, and extort from them; more grievously even than from the Laics; and thus the Poor of Christ do they of their due Alms defraud; for by how much the more the Fisc taketh, so much the less taketh Christ; the simple they do oppress, Robberies on all Sides do commit, righteous Judgment do pervert, the Keys of the Church do vilipend. What Marvel then, if Men so mistaken, so blinded, so wicked, which be the Leaders of the simple, do, like Acor, hinder and disturb the Host of all the Army from their happy Campaign? Out of our Pride, out of our Unrighteousness [and out of our Madness], doth our Confusion proceed, and of our Foemen the so speedy Victory. Also our Foes do continuously toil and watch, and do, without ceasing, devise by what Means and Ways they may prevail to destroy us and our Place. We, if ever,—albeit seldom,—we do begin well,—in a Moment do forbear, and,—as though the Damages irreparable, and everlasting Disgraces done unto us, be no Concern of ours,—do, upon our own private Mockeries, and Insolencies, and Commodities, insist;—seeking the public Utility of Realm and Church, with mere windy Words and inked Parchments. Also our Foes do right well cherish and welcome the valiant Men whom they

were not to be entered by the King's Writ, without the

have of their own, and for hired Soldiery;—and, from our Spoils, and the Ransom of our Prisoners, do, according to the Variety of their Estate, bounteously advance and enrich them all. They do love one another, and do keep Faith with all Men; and, by these Things, they do draw the Hearts of all unto them. We,—of the valiant Peers, puissant and mighty, whom we had,—have sundry slain, sundry cast for Life into Imprisonment; others we do to this Day threaten openly; against others plot in secret: our Subjects we do impoverish; scarce to any One do we keep Faith; we love not One another; we stoop to call in the Aid of Aliens against our own;—whereby prevailing, we do perish! Justices we do assign to take away all evil Men, and their Accomplices, Kindred, Friends, and Fautors,—haply not always in the Zeal of Justice, but sometimes of Envy and Vengeance. Nor is it to be gainsaid but that it were fit, as it is premised, to punish and chastise Sundry, whose evil Deserts do so require, and Others.—But fitter were it, after Wrath, to remember Mercy, and, with tearful Prayers, to intercede with the Prince, that now His Wrath may be stayed from His People, that the Land be not made desolate, and that He destroy not every living Soul. For a very perilous Thing it is to spill all the Blood that is evil; lest haply not a good Man be left alive; and there is a Time of spilling, and a Time of gathering up. Also when the Foes go forth to Battle, not with fleshly Weapons alone, but with the spiritual Sacraments do they store them; Scouts they send forth,—Victual needful—and sufficient for their Army do they dispose. But we, without Sacraments, without Victual, without Scouts, do pompously go forth and vauntingly. Whence it befallerh that, by Starvation of Hunger, before any warlike Encounter, we with our Carcasses do fill the Fields;—and we who are left over be suddenly encompassed by the Foemen, and, confounded, inwardly in Conscience, and outwardly in Want, we shamefully do turn our Backs, be taken, be slain,—unless perchance, of the Mercy of the Enemies, we can obtain to be ransomed. And these Premises do indeed withdraw and turn away the Hearts of almost all the common Folk; insomuch that, unless they may enjoy a better Governance, they say, that they had rather adhere to the Foemen than thus languish any longer. Also the Foes, in their Councils and Transactions, do determine and handle with Certainty the public Profit of their Advance, and their Assault, and other Crafts of War; and then the Truth, with free Voice,

Consent of the Occupant. Of such a Character was that

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every Man speaketh, and is graciously heard, and Praise he earneth, or at least Reproach he winneth not. We, in our Councils and Transactions, passing lightly by the public Advantage, do labour upon Exactions of Tallages, fierce Sentences, and private Gains, or else do nothing at all. But no Man uttereth the Truth. But either all be dumb, or, to please, put down the Truth by a Whisper, and so mislead the Prince, and put the whole Realm to Danger. And, in Sooth, this is most of all a shameful Thing, in Prelates, to be thus silent, to muffle thus the Bells which be hanging from your Vestments that they make no Sound, and thus the Truth which is God's, for human Favour, or vain Fear, so shamelessly to forsake;—a vain Fear, I say; and ye do for the most Part tremble with Fear, when there is no Fear. Ye are dreaming, at Whiles, of Perils, over you and your Churches imminent; the which shall never happen. Never have they gone up into the Heart of Man. And, if it should by Chance have been threatened against you, God will scatter the Councils of them that do threaten it. And, be it that the Perils be imminent, never but of Persecution hath glorious Victory accrued unto the Church. And, if there be none to set himself against the Storms that be against Her, the whole Church together will in a little be submerged. My Reverend Lords, bethink You, for the Love of the Crucified, how that, from the lowest Dust, God hath raised You up, to be seated with the Rulers, and to fill a Throne of Glory, not that Ye may hold Your Peace, but that Ye may be Watchmen, and unto a sinful People tell their Sins;—the which if Ye shall not have done, their Blood is, as Ye wot, required of Your Hands. And it is, in Sooth, ascribed to Your Cowardice and Silence, that so many Woes unto the Realm and Church Anglican have happened in these Days. Return, therefore, then into Heart,—Reverend Fathers,—if Heart Ye have;—else if Ye be without Heart, Ye do show yourselves to be as dead Men. Why, therefore, fill Ye so hurtfully the Places of the Living, which have the Will and the Power to serve us? For the Counsel sought of You and Your Clergy,—be careful to tell unto the Lord King, and the Leaders of the Realm, the Errors and Defaults aforesaid; and be persuading the same to study to amend them and repair. And this Counsel shall be more excellent than all Your Gold and Silver.”



which is recorded to have been held by the powerful Family of Braose (*m*); and which had "its own Great Seal and its own Chancellor;" and into which "neither King, nor Justice, nor Sheriff could enter." Whatever the Emergency, the extraordinary Writs of Array could not be obeyed by the Bailiff of any Upland Town, until he had obtained his Lord's Assent to the Proceedings of the Parliament or Shire Court (*n*). The Lordship of Ireland (*o*), the Counties Palatine of Durham and Chester, the Marches of Wales and the Cinque Ports (*p*), were also exempt Jurisdictions; and, when they concurred, their Grants were accompanied with the Proviso, that the Compliance should not prejudice them, nor be drawn into Precedent (*q*). However imperative the Language in which the Mandate was drawn up, we find it often accompanied with a private Instruction to the Officer, charged with its Execution, to take Care, before he executed it, that it would be obeyed (*r*). But the Exemption was not contingent upon the mere Power of Resistance. The "Men of the Mint" were not iron-clad Barons. Yet they had their own Jurisdiction; and their

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The Record then proceeds to narrate what followed upon that bold Answer of the Prelates and Clergy.

"At the End, the King's Envoys, seeing that nothing temporal from the Prelates and Clergy they could obtain, showed forth the Bulls of the Tenth, granted for Two Years by the Lord Pope to the Lord King, and, in common, caused them to be published on the Day, to wit, of St. Vincent, Martyr. And so, after giving solemn Benediction, as the Manner is, the Lord Archbishop dismissed the Council.

"For the which Tenth Biennial, the Lord Abbot, of His Goods Temporal and Spiritual, payed for His Portion iijj<sup>xx</sup>. xiiij<sup>l</sup>. xiiij<sup>d</sup>."

(*m*) 1 Cur. Reg. p. 429.

(*n*) II. Parl. Writs, Div. II. p. 581 (200).

(*o*) I. Parl. Writs, p. 1 (3).

(*p*) Lords' First Report, pp. 218—19; *Fœd. N. E.* t. 1, p. 558.

(*q*) II. Parl. Writs, Div. II. pp. 628—35.

(*r*) I. Parl. Writs, p. 280 (2, 3); 25 *Edw. I.*; II. Parl. Writs, Div. II. p. 393 (66); 3 *Ed. II.*

Sovereign did not disdain to invite their Contribution, by the Promise that the Collection should be left to their "Keepers" (s). The "Terræ Regis,"—or "Lands in Antient Demesne,"—as they were not represented in—so they were not bound by the Vote of the Parliament. They were in no Way subjected to the Jurisdiction of the "Curia Regis," nor of any other Court, out of their respective Manors (t). The King alone could tallage the King's Tenants;—and the Tallage so imposed must have been of a reasonable and customary Amount. It appears, indeed, that Parliament itself could not impose other or heavier Taxes upon those within its Competence (u). On the other Hand, not every King's Tenant was liable to the Tallage. The Crown Grantee of Lands, which had come into the Hands of the King by Escheat, had his Exemption. Forasmuch as the Land, which King John, in His Lifetime, gave unto Thomas the Esquire, the Father of Joan, was an Escheat of Peverill-Honour, and not of the Demesne of the Crown,—Henry III. gave it in Charge unto Thomas de Stanford and his Fellows, for assessing of the Tallage in the Counties of Nottingham and Derby, that, neither upon Master Pauline, the King's Purveyor, who had married the said Joan, Heiress of her said Father, nor upon his Tenants of the Land aforesaid, they should cause any Tallage to be assessed;—and that, if they had theretofore assessed any such, they should unto the said Pauline and his Men remit it altogether (x).

No Aid, and no Subsidy, and, strictly speaking, no Array, could be granted, except for extraordinary Purposes. They were not wanted for the ordinary Services

(s) II. Parl. Writs, Div. II. p. 236 (13).

(t) Fitz. N. Br. 14 C. 14 E.

(u) Compare the foregoing Authorities with the Lords' First Report, pp. 66—7.

(x) Rot. Claus. 36 Henr. III. 8 July; M. 11.

of the State. The Demesnes of the Crown, from the Reign of William the Conqueror down to that of Richard the First, and even to that of his worthless Successor, were of great Extent; and, although much impaired and reduced by the Improvidence of Monarchs, or by other Causes, in after Times, they still continued to be adequate to all but extraordinary Emergencies. Resumption of Grants was always competent to the Sovereign, where no good Cause or Consideration could be shown; and, in such Cases, it was even a Duty, and was constantly practised. On this Subject I have to refer you again to Davenant, who gives many Instances of the highest Authority. In the Public Records there are many more, which had escaped Davenant. I will mention but One of them. There had been aliened from the Crown certain "Demesnes and Villenages" (Villages) in Windsor and Old Windsor. By Inquisition subsequently taken, it appeared that the Alienation was improvident;—and thereupon, by Writ, Henry III. commanded "the Constable of Windsor," to seize all those Lands and Tenements into the King's Hands, and to have them in his safe Keeping, unto the King's further Order (*x*). But the Crown Revenues were not confined to the Demesne Lands of the Crown. They were derived from various Sources, and were always susceptible of great Augmentation. Forfeiture, Escheat, and all the Incidents of Tenure,—Tolls, Rents, Fines, Oblates, Commutations of Services or Works, and the like, were additional and immense Sources of Revenue to the Exchequer. The Duties on Exports and Imports were also considerable; and these, in the Case of foreign Merchants at least, were capable of being extended by the Crown, in Return for the Privileges conferred by Way of New Staple (*y*).

(*x*) Rot. Claus. 36 Hen. III. 26 July; M. 9.

(*y*) II. Parl. Writs, Div. II. pp. 217—18 (9).

These were the ordinary and ample Resources of Civil Administration; whilst, on the other Hand, the Law of Military Tenure, that "Cheap Defence of Nations," provided an Army, ever sufficient for the Protection of the Realm as well from foreign Invasion as from domestic Turbulence.

In the King's Hand the Power of the Sword was vested. Without His License it was unlawful to engage in military Enterprise. Private War was forbidden to the Subject (z). Foreign Enlistment,—that Crime of England in the Nineteenth Century,—was equally forbidden. I pause to mention one Instance. Magnus, the Son of Olaf Duff, being about to invade the Isle of Man, then an Appanage of Norway, sent into Ireland to raise Men for the Enterprise. You will recall the Measures taken, by Portuguese and Spanish Bondholders, in the same Island, a few Years ago, for levying Troops, to forward the Designs of Don Pedro, and Donna Christina, upon the Peninsula, or rather to provide Funds for liquidating their own Demands upon those Princes. But here the Parallel ends. Henry III. did not permit the Piracy to proceed. By His Writ, addressed to John Fitz Geoffry, the Justitiary of Ireland, the King, after reciting the Information He had received touching the purposed Levy and Invasion of the Territory of "His dear Friend the Lord King of Norway," thus proceeds, "We, desiring to provide for the Advantage and Honour of the same King, do charge you, firmly enjoining, that you do not permit any to go forth out of the aforesaid Land of Ireland, into the same Land, to invade the Land of the aforesaid King, or to do any Hurt unto Him, or unto His People (a)." The Sword of the Citizen might not leave its Scabbard but at the Word of the Monarch.

(z) I. Bl. Comm. pp. 257—8. IV. *Ib.* pp. 69—70, and *post*, p. 215.

(a) Rot. Claus. 36 Henr. III. 14 November; M. 32 (*in Dorsio*).

The Conservancy of the Peace, the View of Frankpledge, the Watch and Ward, and all the Duties which are supposed to be included, or understood, under that Word of modern Invention, "Police," were in those Days adequately discharged by the Resiants of the several Visnes, without Cost to the Community,—without Anxiety to the Monarch. The Cinque Ports,—in Lieu of Tallage, Aid, and every other Description of Service,—were bound, upon the Summons of the King of England, or His Heirs, to render at their own Cost, for Fifteen Days, their full Service of Ships. According to an *Inspeximus*, tested in the Sixth Edw. I., that was a Service of Fifty-Seven Ships (*b*). According to other Authorities, it was One of Fifty-Two (*c*). In either Case, it was a Service, which provided a Navy fully equal to that of every rival Power, from whom Danger was to be apprehended.

It was only for extraordinary Purposes that the King was authorised to demand those new Resources, which it was the Province of the Great Council or Parliament to bestow. Thereby the Assembly was placed under the Necessity of examining and deliberating upon the Purpose, before the Grant could be made. When made, those only were bound whom the Council had power to bind by the Vote. All the rest were exempted; and, to obtain their Concurrence, the same Debates and Consultations had to take Place with the Authorities of each exempt Jurisdiction, as to the Prudence and Justice of the contemplated Measures, and as to the Exigency of the Case.

It is the Fashion to speak of Supply as though it were a Privilege of Parliament. It is not a Privilege but an Office. When Parliament understood it in that Light, it was an Office well performed. Every Vote,—whether of Supply, of Counsel, or of Enactment,—was in the Nature of a Verdict.

(*b*) *Fœd. N. E. t. I. p. 558.*      (*c*) *I. Rot. Claus. p. xli.*

In the Language of Burke, every Member was bound to examine himself, whether he had any sinister Motive, as if in the Divine Presence, and to act upon the pure Result of that Examination, and not otherwise (*d*). The Monarch expounded to the Assembly the Circumstances of the Case, and explained the Measures in Contemplation. It was for the Great Council to consider whether those constituted a Case, such as Justice would approve, and the Laws warrant. If their "Verdict" were unfavourable, the Grant could not be made. It did not depend upon their good Will to do that which the Laws prohibited. If their "Verdict" were favourable, the Monarch obtained, indeed, a Grant; but only such an One as Parliament had the Power to make. Hence it was always necessary to determine the Extent of their Powers. But, in the Examination of that Question, countless others, involving the most delicate Subjects of positive and natural Law, had to be canvassed and ascertained. Even when made by a competent Authority, the Grant could not legally be left to the absolute Disposal of the Monarch. It was made only upon Conditions; and by the Nonfulfilment of One of them it became void (*e*). It was also, by a steady and jealous Precaution, (to which the Decrees and Orders of our actual Courts of Equity still offer some Analogy), specially appropriated to the particular Service, which had been made the Ground, and Reason, and Purpose, of the Grant. The Exchequer,—into which the Instalments, as received, were paid by the "Elisors,"—was but an Office, or Department, of the Council;—and, for their Application of the Monies so received, the Barons were as much accountable to Them, as the Accountant-General of

(*d*) Speech on the French Revolutionary War, 2nd Feb. 1793; XXXV. Ann. Reg. p. 65.

(*e*) I. Parl. Writs, pp. 104—5 (48); II. Parl. Writs, Div. II. p. 41 (8).

the Court of Chancery now is to that Court. Let me add (for it completes the Analogy), that it was no more in the Power of the Council to consent to a Diversion of the Supplies in the King's Favour, than it is now competent to the other Court, to consent to any Misappropriation whatever of the Funds under its Control, and belonging to its Suitors (*f*).

Thus, to the King belonged Prerogative, or the Right of initiating the Measures necessary to the Common-weal. But the Council alone possessed the Means of carrying them into Effect. In other Words, the Prerogative was fettered by the very Instruments, which its great constitutional Necessity obliged it to employ. Hence, Questions of War and Peace, Leagues, Truces, Reprisals, Armaments, Navigation, Customs, Trade, Transmarine and Provincial Government, Taxation, Franchises, Offices, Confirmation of Charters, Public Justice, and Police,—all which, in One Sense, belonged solely to the Crown, as "*Parens Patriæ*," and by Virtue of the Sovereign Prerogative,—became nevertheless of Parliamentary Competence, so often as the Concurrence and Assistance of Parliament were demanded; that is to say, in every Case, where the Crown alone had not the legal Capacity to ordain, or the Means to carry out the necessary Measures. In Truth, neither the King of England, nor the Prince of Wales, nor the King's Lieutenant, were competent,—without the Concurrence of the Great Council of England,—to transact "any great or weighty Affairs touching the King, or Businesses touching Him or His Realms;" above all, anything that concerned foreign States (*g*). His brother of France seems to have been,

(*f*) I. Parl. Writs, p. 136 (49); II. Parl. Writs, Div. II. pp. 63 (72—3), 92 (71).

(*g*) I. Parl. Writs, Chronological Abstract, p. 31 (1); and pp. 55

at one Period at least, under a similar Necessity (*h*). Other instances have been already cited ; but the following may also serve to illustrate the general Jurisdiction, which, by Virtue of the same Judicial Character that gave to it the control over Supplies, belonged to the Great Council or Parliament.

It exercised a general Superintendence, in the Nature of Appellate Jurisdiction, over the Cities, Boroughs, and Franchises of the Realm ; and these, whenever their Misfeasance or Default was manifest, it held to their Duty (*i*). By it the Great Charter, and the successive Confirmations of the same, were promulgated to the People ;—and by it also such Promulgations were occasionally, and under Circumstances, refused (*k*). If the Ordinances of Trailbaston, or other Measures of general Police, were prepared by that Branch of the Council to which the King's more secret Deliberations were confided, it was in Parliament that their Promulgation took Place, by Delivery unto the Justices (*l*).

In the Council, the King's Prerogative of *Non Obstante*,—otherwise called the Dispensing Power,—as we shall hereafter see, was exercised. It was not in the Power of that Body, even by the most stringent Enactment, to take away, or lessen, or obstruct, that transcendent Prerogative, which belonged to the King, of dispensing,—for the Commonwealth,—with Obedience to the Charters or Statutes, where their Operation was calculated to produce Evil, or to prevent what was wholesome for the public Service. But the

(10), 61 (40), 254 (2), 296—8 (40), 300 (48) ; II. Parl. Writs, Div. II. pp. 157 (24—5) 171 (1), 501 (34—5).

(*h*) I. Parl. Writs, p. 16. *n*.

(*i*) II. Parl. Writs, Div. II. p. 61 (56).

(*k*) I. Parl. Writs, Chron. Abstr. p. 40, *n*. 1.

(*l*) *Ib.* p. 408 (61).



Council had the Duty of Deliberation and Advice, as to the Emergency of the Case, and the Policy of exercising that Prerogative. It was, in Fact, a Branch of its General equitable Jurisdiction. Thus, where, "for the common Profit of the King, and of all His People of England," a Petitioner, after setting out a particular Grievance, occasioned by One of the Provisions of the Statute of Westminster the Second, prayed King Edward the Second that Matters might be restored to their former Condition, "notwithstanding the Statute aforesaid;"—it was ordered by the King in Council, that, whereas similar Relief had been formerly granted to other Petitioners, "by the King's Royal Father and by His Council," the same should continue to be granted, "*non obstante Statuto*," &c. (*m*).

All Manner of Petitions to the King in Person were disposed of in like Manner. They were, indeed, answered by Himself, but still according to the Opinion and Advice of the "Prelates, Peers, and Council of the King" (*n*).

There the King's Serjeants-at-Law received their Instructions, and the Rights of the Sovereign were "defended." There the Creation of Courts, the Increase of Judges, and the Supersedeas of Commissions, were determined; and there, too, long after their Separation from the Great Council, the Seals of the Courts of Westminster were, from Time to Time, called in and cancelled, and others substituted in their Stead (*o*).

The Precepts and Ordinances of "the King and Council" were to be obeyed under the Penalties of "Trespas." The Appearance of Parties summoned was enforced by Attachment. Nor was so bold and indiscriminate a Mea-

(*m*) I. Rot. Parl. 8 E. II. No. 19, pp. 292—3.

(*n*) II. Parl. Writs, Div. II. p. 156 (19).

(*o*) II. Parl. Writs, Div. II. pp. 40 (5), 56 (20), 58—9, 160 (37), 359 (1).

sure, as the Seizure and Imprisonment of that great and powerful Body, the Knights Templars, beyond the Competence of King Edward the Second, acting with the Concurrence of His Council (*p*).

Of the Customs' Duties the Custody belonged to the Council, together with the Right of setting them in Mortgage, or in Farm (*q*).

There the political Affairs of Aquitaine and the King's continental Dominions received their Examination, and were transacted (*r*). There, too, upon Petition from the Isles, and the other Transmarine Possessions of the Crown, the Wrongs of the Lieges were redressed, and Commissions of Oyer and Terminer were granted, to try the Impeachments preferred against the actual Governors or Deputies of those Possessions, and their Justices (*s*).

War was not made, Truces were not determined, nor was Rebellion itself dealt with, unless upon formal Declaration and Proclamation of the Causes thereof, as well to the Enemy as to the loyal Subject. That Declaration was issued, that Proclamation was made, only after Deliberation with the Council, and by its Advice, and upon its Responsibility (*t*). The Law was tender of the Consciences of those whom their Monarch summoned to His Battles. The mere Summons did not make them legal; nor, if they were foughten against Law, did it take away the Liabilities which the Soldiers had thereby incurred. "The Military and Civil Policy,"

(*p*) II. Parl. Writs, Div. II. pp. 7, 8 (36), 34 (15), 79, (5).

(*q*) *Ib.* pp. 23 (11), 101 (29).

(*r*) *Ib.* pp. 43 (3, 4), 70, 76.

(*s*) I. Rot. Parl. 18 Edw. II. No. 1, p. 416, and MS. History of Common Law, *penes me*; pp. 106—7.

(*t*) I. Parl. Writs, Chron. Abst. p. 6, n. 25, n. and pp. 222 (1), 275, 277; II. Parl. Writs, Div. I. p. 390, n.; Div. II. pp. 66 (3, 11), 501 (34), 539 (3—4); App. pp. 29 (2—15), 75—6 (13).

observes Sir Francis Palgrave, "of the Antient Nations were combined; the Army being only another Name for the State or Commonwealth (*u*)."

The Council had Jurisdiction over warlike Armaments, and to it the Selection of the chief Commanders belonged (*x*).

The Chief Ports were subject to its Authority; and the Departure of Subjects out of the Kingdom might, at any Time, be restrained by its Mandates, addressed to their chief officers (*y*). The levying of private War, under whatever Pretext, was jealously forbidden to the Subject. Tourneys, or Jousts, it belonged to the Council to permit, or to prohibit, and the Names of the Contumacious Tourneyers were returned to the Council, "in Chancery," that the Offenders might there be dealt with according to the Law (*z*).

¶ Envoys to foreign States received their Instructions from the same Assembly (*a*). On their Return they had to answer there for their Manner of obeying them. It was for the Council to decide, whether to allow or to annul their Proceedings (*b*).

¶ The Envoys of Foreign Powers transacted Business before the Council;—international Affairs being then considered to be "Matters that touched the whole Realm." The King Himself, if the Council were not then sitting, summoned it upon such Occasions, by special Writs (*c*).

Reprisals were ordered in Council, and the Records of the Proceedings were preserved in the Chancery. In the

(*u*) I. Rise and Progress, &c. p. 304.

(*x*) II. Parl. Writs, Div. II. pp. 377 (1), 302 (6).

(*y*) *Ib.* p. 390 (51).

(*z*) *Ib.* App. p. 19 (18).

(*a*) *Ib.* pp. 43 (5), 55 (27), 124 (81—2), 231 (37), 232 (40); App. pp. 36, 39.

(*b*) *Ib.* pp. 284 (37), 285 (82), 291—2.

(*c*) *Ib.* pp. 171 (1), 230 (36), 501 (34—5).

First Place, there issued the Special Letters of Request ; and, if the Redress were still denied, then upon Certificate thereof, under the Corporate Seal of the Place to which the aggrieved Subject belonged, the Warrants went forth, by which the Bailiffs were directed to seize the Goods of Subjects of the Aggressor Nation, to an adequate Amount, and to keep the same until Compensation should be made (*d*). When, on the other Hand, the Injury had been done by the Subjects of England to those of a foreign State,—or when, for any Reason, the Balance of Compensation was due to the latter, it was by the Council that the Terms of Composition were arranged and concluded. Wrong had been done to certain Flemish Merchants ; therefore the Council of Edward the Second, upon the Representation of the Earl of Flanders, awarded them the Redress they sought (*e*).

Such were the Powers, and such the Duties, of the Great Council of the Realm. Yet the Writs and Records of the Epoch rarely make mention of that Body, as being invested with direct executive Functions. The Crown was the only Source of Jurisdiction. “Every Franchise was Royal, and pertained to the Crown” by its Origin (*f*). Government was for the King. The Council did but advise Him how to govern.

That was, that is, the Language of the Constitution ; nor can the Subject demand a surer Safeguard of his Liberties. The Prerogative, or Right of Initiation, became a dead Letter, unless the Sanction of the Council had been obtained for the Completion, of the Measure. Without that Sanction, the Sovereign had indeed a nominal Capacity of Action, to the Extent of His personal Means and Resources, but not further. He could not demand, as of Right, the

(*d*) II. Parl. Writs, Div. II. App. pp. 16—17 (5).

(*e*) *Ib.* p. 133 (24).

(*f*) “Omnis Libertas Regia est, et ad Coronam pertinet.” (I. Parl. Writs, p. 383 (7).

Co-operation of the meanest Individual, until He had submitted His Measures to the Remonstrance, and Control, and received the Sanction, of His Parliament; nor even then, unless the Sanction were such as the Parliament were by Law warranted to give; that is, unless the Measures were themselves lawful.

The Exceptions are not numerous, where upon the Records that Council appears, not in that Capacity, but as invested with the direct executive Authority, conjointly with the King. An early Instance, and perhaps the First on Record, occurs in the Tenth Year of the troubled Reign of Edward the Second;—where Writs appear to have been issued, “*per Ipsum Regem et Consilium.*” In the Reign of His Father there are several recorded Instances, where Ordinances and Precepts of a declaratory and perhaps legislative Character, expressly bear to have been made, “by Our Lord the King and His Council.” But between Acts of that Character, and the Exercise of Functions purely executive, the Difference is obvious and wide (*f*). Yet even in the Enactment of Laws and the Promulgation of Ordinances, the King, in by far the greater Number of Cases, appears alone upon the Records, as the Authority, whence emanated, and whereby was commanded, the Measure. The Council, although in each Instance possessing a real and even a direct Authority, almost equal to His own, appeared but to recommend or advise it. Such indeed is still the Language of the enacting Part of every new Statute.

The Parliaments of those Days, whilst they limited the Prerogative, made not that Limitation their sole End and Aim. Then Parliament was universally felt to be, that which the Law still recognises in it, the King’s Highest Council of State. Each Member of Parliament was the

(*f*) I. Parl. Writs, pp. 226 (18), 272 (5), 394 (36); II. Parl. Writs, Div. II. p. 166 (1).

King's "Servant," the King's "Minister," the King's "responsible Adviser." The Fiction of a "Cabinet" was then unknown; the Doctrine of "Majorities" and "Minorities" had found as yet no Place. There were neither Treasury nor Opposition Benches. The Fate of a public Servant did not depend upon the Strength of his Sect, nor on the Popularity of his Doctrine. Men in those Days could neither win nor lose Place by Victories or Defeats in Parliament.

Then the Responsibility of Officers of State was practical and real. When all Parliament Men and King's Executive Officers, were alike Servants of the Crown, no Prejudices of Caste, no Interests of Party, intervened to screen such as were guilty or incapable from the Pursuit of the Rest. Ministers themselves were often the First to grant Redress against the Acts of their Fellows. In the Reign of King Henry the Third, the Lord Protector Pembroke is recorded to have given Relief, as prayed, to one aggrieved by His Highness's own Colleague, the Justiciary of England. The Justiciary, in Return, awarded to another Claimant due Satisfaction for Injustices which he complained to have received from the actual Chancellor of England; and, to another, he gave similar Redress against his brother Dignitary, the Justiciary of Ireland (g).

Those were Cases of a civil Character, where the Injury to public Justice was sufficiently atoned for, when Satisfaction was made to the Party litigant. But, in criminal Cases, Recourse was had to the formidable Method of Impeachment before the Council itself, or its Committees. It was generally sufficient if the Presentment were made upon the Oaths of "Twelve Men," as in Cases of meaner Delinquency (h). But, when Adam de Stratton, the Chamberlain

(g) I. Rot. Claus. pp. 378, 569—570.

(h) I. Parl. Writs, Chron. Abstr. p. 14, n. 1, and p. 394 (35).

of Edward the First, was impeached for Extortion and Oppression, Proclamation was made throughout all England, in every Shire, that all who had been aggrieved by that mighty Offender, should appear before the Barons of the Exchequer, to prefer their Complaints, and to receive what "the King and Council," should ordain. From every Shire, at the same Time, and the same Place, "a Jury of Twelve Men" was to be returned by the Sheriff, by whom the King might be the better certified of their Complaints, and the Truth thereof be made the better known (i).

If the Crime of the Offender were One cognisable at the Common Law, it was dealt with accordingly. But, if it were One for which an adequate Relief was only to be sought from the Equity of the Sovereign, the Great Council alone had Jurisdiction. Then an extraordinary Tribunal was appointed, with Instructions to do summary Justice in the Premises, and "without the Delays allowed in ordinary Courts." In the Instances to which I refer, the Mandate declares the Objects of Investigation to have been the Offences and Defaults of corrupt and tyrannical Officers (k). It is painful to contrast that Simplicity of Procedure with the Hundred unworthy Artifices, by which the guilty Anxiety of coronetted Judges for the personal Safety of Warren Hastings, and perhaps a Fellow Feeling for his Crime, made his Acquittal the more easy, and ensured Impunity to all future Criminals that should walk in his Footsteps.

Of the Methods of constituting the Council, we know but little. The Names of a few only of the Members have come down to us. The Records seldom enumerate those of the less influential Members, and never, unless in Connection with Affairs, in the Transaction of which some of the latter

(i) Memoranda in Scaccario, *apud* Palgrave's Rise and Progress, Vol. I. p. 309.

(k) I. Parl. Writs, pp. 398—400 (43).

had taken Part. Of the Members of the Councils, or Curiae, which met during the long Interval between the Twenty-Eighth Year of the Reign of Henry the Second, and the Fifteenth Year of John inclusively, the Names of only Thirty-Four are to be found in the Fines,—levied thereat during the same Period,—the fullest and most authentic of its Records (*l*). Yet, who, that is familiar with the Parliamentary History of the Time, and more especially with that of Henry's Reign, can doubt that the Great Councils of the Realm were, upon Occasions, far more numerous attended? This is still more true of the Meetings of the Council in after Times, for, if we are to confine ourselves to the Language of the Records, we must suppose that in One Parliament there sate only Twenty-Three Persons; and that in One other,—which is nevertheless styled a “full” Council or Parliament—only One Archbishop, Five Bishops, Three Earls, and Thirty Barons attended (*m*).

It is unnecessary to examine the various Opinions, emitted by learned but partisan Writers, in modern Times, upon this Question, or, in general, upon any other Question, touching the Classes or Ranks of Men which were the Elements, whereof the early Parliamentary Assemblies of this Country were constituted.

That the Greater Barons and the Prelates were Members of the Council, and were specially summoned to it, has never been disputed. That the Minor Barons, or simple Tenants in Chief of the Crown, were also Members of it, but not as it seems summoned to attend it, the Authorities, compiled with so much Industry by the Lords' Committee in their Four several Reports, can scarcely permit us to doubt. That the Principle of Representation by Deputies obtained as early as the Reign of John, among the Minor

(*l*) I. Fines Introd. pp. xxxv. lx.

(*m*) I. Parl. Writs, pp. 6 (3), 65 (4).



Barons, and that—like the other “*Thanes*” of the *Shire*, and the “*Jurors*” of the *Hundred*, and the “*Good Men*” of the *Vill* (whose *Proceedings* in that *Respect* we have examined and ascertained)—they were, generally speaking, well pleased to transfer from themselves, to a select Number, the weighty and costly Burthen which personal Attendance in the Royal Councils involved,—is strongly probable in itself, and powerfully supported, not only by Analogy, but by direct Authorities, which are to be found in the valuable *Compilation* already noticed. That the *Villeins* were represented by their respective Lords, and bound by their Votes, is undoubted. That, in general, the same Lords were authorised by the Delegations of their own *Frank Tenants*, to “*treat*” and “*transact*” for them, is likewise highly probable. That the *Justices* were constant in their Attendance as Members of the Council, and that they expressed themselves there, with Freedom and Authority, upon all Questions of Law or Justice, is Matter of Record. That, besides these, it was the Right as well as Practice of the Sovereign, to summon to the Council, from Time to Time, such “*Councillors*,” “*Clerks*,” and “*Learned Men*,” as He considered it desirable to consult with, upon the particular Emergency, and to dismiss them when He thought proper no longer to require their Presence, is equally manifest (n). But further than this it would be useless and perhaps impossible to push Investigation. The comparative Ranks and Degrees of Men,—the Grades which classed the Barons among the Greater or the Minor,—whether all Tenants in Chief, or only Military Tenants, were included among the latter,—and the Limitations of the Elective

(n) See, in particular, the Writs of Edw. I. summoning Clerks, Lawyers, University Men, and other “*Learned People*,” for the Benefit of their Opinion touching His Scottish Title; *I. Parl. Writs*, pp. 91 (8—10), 92 (19).

Franchises, and the Number of Representatives,—or whether any such Limitations existed;—these are Speculations, which, however much they may interest or amuse the Antiquary, would be vain and useless in themselves, even did Authorities exist by which they might be decided.

It is sufficient to know that, to the Parliament or Councils of the Realm, all Persons whatsoever, and of whomsoever Tenant, were bound to repair, when summoned by the Sovereign, and thereat to afford Him their Help and Counsel to the utmost of their Power. The Procurator of the Abbot of Northampton, when he prayed on that Prelate's Behalf an Exemption from Service in Parliament, did not venture to deny that it was his Obligation to serve there, if the King persisted in requiring his Presence. Had he done so, observes the Record, he feared to have made himself liable to Punishment, as in Cases of Contumacy or Contempt. But he grounded his Petition upon the historical Fact, that never, until then, had an Abbot of Northampton been summoned to the Parliament. And so, from the Goodwill of the King, —aided by the powerful Intercession of "His Right Honourable Lord, Monsire Thomas, Earl of Lancaster, Seneschal of England,"—the Petitioner obtained the Exemption which he sought (o).

It was, in like Manner, a high Contempt and Trespass in any Councillor, to refuse to advise the King, however grave the Matter, and however reluctant to incur the Responsibility of giving Advice, the Councillor might be. The Offence was one punishable by Imprisonment; mainpernable, nevertheless, upon good and sufficient Recognisances (p). It was a necessary Consequence of this Obligation to give Advice, that the Members of the Council were entitled, or rather bound, to employ the utmost Freedom of Speech,

(o) II. Parl. Writs, Div. ii. p. 199 (47).

(p) *Ib.* p. 285 (82).

and Boldness in Opposition, when the Measures propounded appeared to call for such. Hence the arbitrary Conduct of Edward the Second, in having, upon several late Occasions, browbeaten and overawed his Council into the Adoption of ill Measures, was openly denounced in the spirited "Schedule," or Remonstrance, (already mentioned to have been read and adopted by the Convocation of Lincoln,) as the main Cause of the many Disasters and Disgraces, which had latterly tarnished the Glory, and emperilled the Safety, of the Realm, in the Wars with Scotland. Very different was the Manner of Robert the Bruce. "In their Councils and Deliberations," they say, "our Foemen do determine and develop with Certitude, the public Usefulness of their Enterprises, and Assaults, and other Crafts of War. And there too, with free Voice, each Man speaketh, and is heard with Kindness, and winneth Thanks, or at least getteth him not foul Words" (g).

Of the Members of the Council, some were appointed,—for Life, or otherwise,—by the Sovereign, who, nevertheless, do not appear to have been Barons, nor Prelates, nor Representatives of Communities (r). Those were specially "Sworn of the Council" (s); and, under that somewhat peculiar Designation, they were for ever afterwards exempted from taking the Oaths, usually demanded, upon passing official Accounts of Receipt and Expenditure; those, for Example, of the Wardrobe (t). They appear to have answered, in all Respects, to the Character of the "Rædegifan," or "Consiliarii," of the Confessor. There is also no Doubt that when, in some of the later Writs, (or "Parliamentary Writs" properly so called,) we find it charged to

(g) II. Parl. Writs, Div. II. p. 284 (76).

(r) *Ib.* p. 162 (46).

(s) *Ib.* p. 3 (5), 156 (19).

(t) 1 Rot. Claus. Intr. xiv. l.

the Persons summoned, that they do repair, with the Parliament Men, "and Others," to the Council of the Monarch, the Word "Others" is employed to denote the King's Special "Councillors," as distinguished from his General "Councillors," or Members of Parliament (*u*). When Chief Justice Brabazon resigned his Office of Chief Justice, he would thereby have ceased to occupy the Seat in Council, which he had filled in that judicial Capacity. But the King gave him a new and distinct Appointment to the Council, and so retained him in his Place (*x*). On the other Hand, those Special "Councillors," as we have remarked already, were official Members of the Parliament, or Great Council, without possessing any territorial or any other Title to that Dignity, than that such was the Sovereign Will of the Monarch.

But the greater Facility, which the Selection of a smaller Body of Men afforded, for the Expedition of public Business, made it of the same daily Experience, after the Norman Conquest, as it had been under the Saxony Dynasty, for the Council to delegate, from Time to Time, to its Select Courts or Committees, such of its Functions and Powers as were necessary to that End. Hence the Court, called the "Triers of Petitions," took its Rise, or rather was revived under that new Name, in Edward the First's Reign. It is curious to remark that its Constitution was Duodenary. It consisted of Twenty-Four Members; and those, subdivided into Sections, heard and disposed of the Petitions for the Redress of Grievances, that came from England, Scotland, Wales, Ireland, the Isles, and the English Dominions in France (*y*).

(*u*) I. Parl. Writs, pp. 29 (23), 79 (6), 83 (2), 113 (7), 120 (55), 513 (7).

(*x*) II. Parl. Writs, p. 162 (46).

(*y*) 1 Rot. Claus. Intr. p. xxviii. ; I. Parl. Writs, p. 155 (44).

Neither the Name, nor the Office, have been wholly lost, even in these Days; and, although the Duties attached to both have long since ceased to be discharged, it is still the ceremonial Custom of the House of Lords, at the Commencement of every Parliament, to choose the "Triers," or "Auditors of Petitions," from amongst the Members of the House. That derivative Court of Equitable Jurisdiction might, like its Predecessors, have grown into Greatness, and, perhaps, like them, have separated itself in Time from the Parliament, but for the sudden Rise of the Power and Influence of the Third Estate of Parliament, which happened about the same Period, and above all, that Division of Houses which followed not long after. From that Time the Commons of the Lower House assumed to themselves, by Degrees, the Right of hearing and answering, instead of preferring Petitions; and so the Remedial Court of Triers or Auditors fell gradually into Disuse; whilst the Privy Council, and the Courts of Chancery, King's Bench, Common Pleas, and Exchequer, not only continued to maintain, but so largely extended, their derivative Jurisdictions, that their Origin has almost become forgotten in their Greatness.

Other Instances of the Duodenary Committee, and the more interesting, because they testify to the Universality of the Practice, are to be found in the early Parliamentary History of Wales. To the Parliament of York, in the Fifteenth Year of Edward the Second, the King summoned Representatives from North and South Wales, by a Writ directed to the Justitiary, Edmund, Earl of Arundell. By that Writ, after reciting the loyal and meritorious Conduct of "the Lieges, as well Knights, as Others of that Country," the Earl was directed to summon "Twenty-Four discreet, lawful, and able Men" from North Wales, and another Body of the same Number and Character from South Wales; each Body having "full and efficient Powers on the Part of their Communities" respectively; and to cause them to

repair to the King's Parliament at York (*z*). In like Manner, "Twenty-Four" Representatives were summoned from North Wales to that Parliament at Westminster, in the Twentieth Year of the same Reign, by which Edward's Deposition, or rather "Defiance," and His Son's Accession, were proclaimed; in Order to obtain their Consent to such Ordinances as should there be made, "for the Common Profit, Peace, and Quiet of the Realm" (*a*).

The same Number, with its Multiples, (sacred from the Association with Courts of Justice,) is constantly to be met with throughout the Period, which is here endeavoured to be traced. When the Peers of England refused to attend the Military Summons of John Sansterre, because they would not fight under the Banners of an excommunicated King, "Twenty-Four" Earls and Barons became His Sureties unto the exiled Archbishop of Canterbury and his Suffragans, for his and their Safe Conduct into England, and for the due Performance, by the perjured King, of the Conditions of the Absolution sought (*b*). "Twelve" in Number were the Prelates, whom the Parliament, in the Twenty-Eighth Year of King Henry III. named as their Committee, to confer with the King, and to show their Reasons for refusing him a Grant (*c*). The "Ordainers" of Oxford, in the Forty-Second Year of King Henry III. were in Number "Twenty-Four;" the Delegates of the "Community" were "Twelve"—for general Purposes—and "Twenty-Four"—when an Aid was the Matter to be discussed (*d*). "Twelve" was the Number of the extraordinary Council in the Forty-Eighth Year of King Henry III.; and to "Twelve" it was committed, in the Fifty-First Year of the same King, to

(*z*) I. Rot. Parl. 15 Edw. II. No. 34, p. 456; App.

(*a*) Fœd. N. E., T. II. p. 649.

(*b*) Wendover, Vol. III. pp. 259—60.

(*c*) M. Paris, Ann. 124—4.

(*d*) Fœd. N. E. T. I. p. 371;—Annals of Burton—Rot. Pat. 42 Hen. III.

make the famous "Award," or "Edict of Kenilworth" (*d*). "Twelve" Deputies were charged, in the Name of Parliament, to invite the Attendance there of King Edward the Second; and again to "Twelve Ordainers" the Reformation of the Realm was, in the same troubled Reign, confided" (*e*). "Twelve Peers, the Greatest and Wisest of the Realm," by an Ordinance, made at the Coronation of His Successor, were appointed to be the Guardians of the young King, because of his tender Age; by whom "the King, for the good of the Realm, and Safety of His Person and Honour, should be governed and ruled, and without whom Nothing should be granted nor done" (*f*).

Of the same Origin with the "Triers of Petitions," and the other Committees I have mentioned, came that of the "Select" or "Standing Council;" and that Council too, apparently, was at First of the same Duodenary Constitution. The "Rædegifan," or those, "Sworn of the Council," belonged to it, as of Course. Their Oath pledged them to keep the "King's Secrets," and to discuss them nowhere but in Council. It resembled in every Point the Privy Councilors' Oath of the present Day. The Justices were likewise Members, as were also the Greater Barons,—such of them at least as received Writs commanding their Attendance. But the Parliamentary Members, who represented Communities, had, in general, Duties to discharge within their own local Jurisdictions, which demanded their personal Supervision. Thus, for Example, the Conservators of the Peace for the Shires were, with scarcely an Exception, the same Knights whom the Shires returned to Parliament (*g*). It

(*d*) Foed. N. E., T. I. p. 443; Annals of Waverley, An. 1266.

(*e*) II. Parl. Writs, Div. II. p. 354 (20); and App. p. 267.

(*f*) Barnes' History of Edward III. pp. 4, 31—2, 49.

(*g*) See "Conservancy of the Peace," in Appendix to Vol. I. of "Rise and Progress," &c. p. cccc. l. iv.

is true that the Duties incident to that Office, although they embraced, among others, that of making Monthly Returns to the Great Councils,—or, during the Recess, to the “Standing Council”—were no sufficient “Essoign,” while the Great Council was sitting, for Non-attendance there (*h*). But, when the Season of Parliament was passed, the Obligation of giving a personal Attendance to the Duties of their local Trust devolved once more upon the Knights Conservators. In like Manner, it was proclaimed at the End of every Session, to all the other Members,—Spiritual or Lay—and as well to the Archbishops, Bishops, and other Prelates, the Earls and the Barons, as to “the Knights, Citizens, Burgesses, and others of the Commune”—after thanking them for their Presence,—that “it was the King’s Will that all should return into their own Country,” save such as had private Business to transact, and “save the Bishops, Earls, Barons, Justices, and Others, which were of the Council of the King; for those should not depart without the King’s especial Leave” (*i*). The Spirit of the Institution has been lost. But the Form is preserved; and the trite Clause, in every Speech for the Prorogation of Parliament, according to which the Members are contemplated to be on the Eve of returning to their respective Counties, is all that is left of the Proclamation of King Edward the First, and the Wisdom of the Epoch!

When Parliament was not sitting, the Select Council discharged the more pressing of the public Affairs, exercising in its Deliberations an Authority equal to that of the Great Council from which itself had emanated, and of which it was the acknowledged Representative and Delegate. The Eighth and Fifth, levied by the Writs tested the Thir-

(*h*) II. Parl. Writs, Div. II. p. 482 (29); and Appendix, p. 74 (33).

(*i*) I. Parl. Writs, p. 155 (44).



tieth of July, in the Twenty-Fifth Year of King Edward the First, and the Ninth, levied by the Letters Patent, tested the Fourteenth of October in the same Year, and each of which expressly bore the Sanction of "the Council," certainly were not granted by the Great Council; for it was not then sitting. The Sanction given was that of the Select, or Privy Council; acting, nevertheless, within the Scope of its derivative Authority (*j*). Tallages, in like Manner, and,—where the Emergency was such, as to embolden the Councillors to take upon themselves a Responsibility hazardous and odious,—Forced Loans, are recorded to have been made by the Privy Council between the Seasons of Parliament (*k*). But, in general, the Functions of that Body, although most important, did not embrace Matters so weighty as Supply. *That* was a Matter, which was generally left to the Consideration of the next Parliament.

The Privy Council confined itself, for the most Part, to the Exercise of Diplomatic, Judicial, and Ministerial Functions. Even so late as 1772, we meet with the Recollection of those Functions in the Debates of Parliament. When Lord North first proposed his Select Committee of Enquiry, into the Affairs of the East India Company, many Reasons were urged against the illegal and oppressive Measures of the Minister. Amongst others, it was said that Select Committees are unconstitutional Bodies, because they are not accountable for their Conduct, and that their Proceedings are often Secret—never altogether Public—and consequently that they are in no Fear of public Censure. The constitutional Course, it was said, was to cause the Enquiry to be taken, if at all, by the Privy Council, or its Committee of Trade and Plantations, as they are amenable to Justice; being the recognised and constituted Tribunals for such Purposes. You may remember that,

(*j*) Lords' First Report, pp. 221—227.

(*k*) II. Parl. Writs, Div. II. p. 84 (27—9.)

amongst the foremost Members who resisted Lord North on that Occasion, One was Edmund Burke (*l*).

The emphatic and comprehensive Language of old Records, describes the Select Council as being charged with the Discussion of the King's "Secrets;"—whence its Name, "Privy Council,"—or "Secretum Concilium Nostrium" (*m*). With the same Terseness and Accuracy, they define the Authority of the Council to consist, in its being the necessary Instrument of Prerogative;—"so that not even the Business which could be done by the King, without the Parliament, should be done by Him, without the Standing Council" (*n*). In this Respect—the more remarkable because no parallel Instance can be named,—the Privy Council possessed an Authority, which did not belong to Parliament.

Of any Peculiarities in the Methods of transacting Public Business by Means of that Select Body, scarcely any Information is to be found in what contemporary Records have come down to us. There was a "Chief," or "Cap'tal," as the "President of the Council" was designated, in the Reign of Edward the Second. Thomas Earl of Lancaster, while at the Zenith of his Greatness, was the Cap'tal of that Sovereign's Privy Council. Without "his Assent, and that of the other Prelates, Earls and Barons, who, to counsel the King, should be ordained, no great or weighty Matters, or Businesses whatsoever touching the King or Kingdom, should be done or performed. In the Hour that his Lord, the King, should not do according to him, and the others of the Council, after the same had been shown unto Him, and He would not, by Counsel of the

(*l*) XV. Ann. Reg. p. 103. Compare XXX. Ann. Reg. pp. 133—4, Hist. E.

(*m*) II. Parl. Writs, Div. II. pp. 162—3 (46); 1 Rot. Claus. Introd. p. xxxviii. (Note 5.)

(*n*) *Ib.* p. 184 (5).

Capitall, and others aforesaid redress them," the Capitall was free, "without Ill-will, Challenge, or evil Feeling, to discharge himself of the King's Council" (o).

On the other Hand, it was the undoubted and reserved Right of the Great Council, or Parliament, to watch the Proceedings of the derivative Body, to which it had delegated so many of its Functions. The Removal of Privy Councillors was from Time to Time to be debated in Parliament. Hence, for their greater Security, the Records of the more important Transactions between themselves and the Monarch were from Time to Time entered upon the Rolls of Parliament. That Body had, in Fact, possessed, from the earliest Times, an Appellate Jurisdiction over the Privy Council. "The Rex et Sapientiores" of the Norman Princes were distinguished from their inferior Committees in the Curia Regis, not only because to them were reserved, in the First Instance, the more Important Affairs of State, but also because they constituted the Highest Court of Appeal for all the Realm. The same Distinction is clearly traced through all succeeding Reigns, and the "Parliament," and "Secret Council," of the Edwards, were but new Designations for the Saxon Witenagemot, and the Norman Curia Regis, and the Branches common to both (p).

Then the Parliamentary Responsibility of Privy Councillors was something more than a Name. There was then a ready Mode of bringing it Home to every one of the Members, present at the Deliberations of the Body, and concurring in what was there done. "Memoranda" of what took Place were regularly made and recorded, and sometimes, as we have seen, these, for greater Security, were entered upon the Parliament Roll. By Means of those Memo-

(o) II. Parl. Writs, Div. II. p. 157 (24—5).

(p) I. Rot. Claus. Introd. xxvi; I. Parl. Writs, p. 131 (63); II. Parl. Writs, Div. II. p. 15 (24—5); p. 157 (24—5).

randa, it clearly appeared, who were the Councillors that had given the Advice. These, moreover, were the "Testes" to the Execution of it ; and, as such, their Names were inscribed upon the Face of the Instruments, which in the Execution of that Advice were required. For Instance, the Commission, which issued under the Great Seal of King Henry III. for treating with "Our very dear Brother, Alphonso, of Castille," was tested by "W. de Braosa," the Chancellor (*q*). Sometimes, indeed, it happened that the Great Seal was taken out of the actual Custody of that Officer, by the peremptory Mandate of the King, and employed against his Advice, or without his Sanction. But Provision was made for such a Contingency. "Memoranda,"—of the King's Order,—of the Date of the Surrender of the Great Seal,—and to whom,—and of the Period of its being returned to the Chancellor,—were carefully recorded and kept. By the Facts there stated, the Guilt or the Innocence of the Officers apparently engaged in the Transaction might be established. If Contrivance or Collusion on the Part of the Chancellor did not appear, he was discharged of all his Responsibility, for Acts done under the Great Seal, from the Period of his surrendering it, down to that of his receiving it back (*r*). It is highly probable, that the same Precautions were taken with Respect to Seals of Office generally (*s*).

It is true that "Hiis Testibus" was Once dispensed with by Henry the First, and "Teste Meipso" substituted in its Stead. It is also true that this was frequently done by Henry the Second, and other Plantagenet Kings ; and that

(*q*) Hardy's Descr. of Pat. Rolls, pp. 88—9.

(*r*) II. Parl. Writs, Chron. Abstr. pp. 18—19, Notes ;—and Div. II. pp. 14 (71—2), 15 (77).

(*s*) For the Nature of Signet and Privy Seals, see the Case of "Re Nickels' Patent;" before Lord Cottenham, C. (1 Phill. Ch. Reports ; p. 36).

in and after the Reign of Richard the First, "Nos," and not "Ego," became the Style of regal Mandates. But these were Innovations, which regarded Matters of a slight and trivial Import, and to such were steadily confined. It is a remarkable Fact, that, even in the Times of the Plantagenets, "Hiis Testibus,"—or the Testing Clause, in which the Names of the responsible Advisers of the Measure were to be inscribed,—was never Once omitted from any Instrument of Importance, or that related to any great or solemn Occasion or Concern (*t*).

Towards the End of the troubled Reign of Edward the Second, the Privy Council had grown into great and even undue Importance. The Power of the Crown, wrested from the weak Hands which sometime swayed it, had now devolved upon those, who, by their armed Partisans, kept down Opposition for a Time in Parliament and Council. But the Violence of the Proceedings rendered them of brief Endurance. In Defiance of the unlawful Prohibitions of the Capal, Others were added ; or, as he expressed it, added themselves to the Council, "by Secret Bond" with One another, and with the King (*u*). At a later Period, by Negotiation with the Barons, the Elasticity and Independence of the Council were restored, at least until Parliament should have Time to assemble ; and to make a lasting Settlement of the Matters in Debate, it was agreed that the Privy Council should consist of the Seventeen Bishops, Barons, and Gentlemen then and there named,—the Capal's own Banneret being One of them,—and that, of these, Five should be the Quorum to attend the King, for the Transaction of public Business ;—a new Quorum to be selected, from among the remaining "Twelve," at the End of every Quarter. Parliament ratified the Arrangement ;—and, moreover, prayed the King, that He would

(*t*) I. Rot. Claus. Gen. Introd. pp. xvii. to xix., and the Notes.

(*u*) II. Parl. Writs, Div. II. p. 120 (25), Appendix.

vouchsafe, for all Time coming, to choose His "Standing Council" from amongst them, and upon the Footing of that temporary Arrangement (v). This, in Truth, was nothing more than a Parliamentary Declaration of the Laws and Constitutions of the Country. The King promised to guide Himself in Conformity with their Prayer.

Towards the End of the Reign of Henry the Fourth, another Act, declaratory of the Powers and Duties of the Privy Council at the Common Law, received the Royal Assent. As this Statute comprised, in general Terms, all that the Authorities quoted specify in Detail,—and that the former are to be taken to their very Letter, the Exceptions that are expressed sufficiently testify,—I have thought it worth transcribing, at Large, from the Parliament Roll of the Epoch. You will not fail to remark, that the Privy Council, so constituted, was composed of unofficial Personages, as well as of Ministers, but that the Number of the Former was Twelve.

"Be it remembered, that Our Sovereign Lord the King, considering the great Labours, Occupations and Diligences, which He must necessarily bestow concerning the good Governance of His Realm, and of other His Possessions, as well on this Side of the Sea as on the other;—Firstly, for the Conservation of the Rights of Our said Lord the King, and of His Crown, and that the Revenues thereof may be better gathered unto His Profit, and increased as much as Man may justly do it, to the End, that He may the better His honourable Estate sustain:—And, Secondly, for the Conservation of the Laws and Statutes of the Realm, to the End that equal Right may be done to every One, as well to Poor as to Rich:—Our said Lord the King, of His proper and good Will, desiring to be supported in the above-named Causes, for this that He may not well have

Leisure for them in His proper Person, not so much as He would ;—For the great Love and good Affiance that He hath, amongst Others, unto the Right Reverend and Reverend Fathers in God, and Right Honored Lords, the Archbishop of Canterbury, the Bishop of Winchester, the Bishop of Exeter, the Duke of York, the Earl of Somerset, the Sire de Roos, the Sire de Burnell, the Sire de Lovell, the Sire de Wilughby, the Chancellor, Treasurer, Keeper of Privy Seal, the Seneschal and Chamberlain, Monsir Hugh Waterton, Monsir John Cheyne, and Monsir Arnault Savage,—Them hath chosen, charged to be of His Council ;—In praying and commanding them, that, in all the above-named Causes, they will bestow their entire Diligences, for the Profit of our same Lord the King, and for the Conservation of the Laws and Statutes above named ;—That thus, by all Ways, among their good Labours and Diligences, He may the better be discharged in His Royal Person of the Occupations above named ;—And to the End that the above-named Reverend Fathers and other Lords ought the more willingly to be of His Council the above-named Our Lord the King hath made it to be said, in His public Parliament, that they be of His Council ;—And them will support, in all the above-named Things, and every of them ; in having always Affiance, that they will do for the Weal and Profit of Him and of His Realm ; without doing nor suffering to be done Aught, in Hinderance of the good Conclusion, which shall be able to come by their good Labours and Diligences ;—And that Bills, to be endorsed by the Chamberlains, and Letters, under the Signet of Our said Lord the King, to be addressed, and other Commandments to be given, to the Chancellor, Treasurer, and Keeper of Privy Seal, and other Officers whatsoever, from this Time forth, in such Causes as above, shall be endorsed or made by Advice of the Council ;—And that the

said Chancellor, Treasurer, and Keeper of Privy Seal, and other Officers, do not act, in those Causes, but by Advice of the said Council ;—Howbeit, of Charters of Pardon of Crime, and of Collation of Benefices, which shall be actually void, and of Offices, willeth Our said Lord the King to do His Pleasure;—And willeth Our said Lord the King that, if they of His said Council be disturbed, that they shall not be able to do the Profit of Our said Lord the King, nor to cause be kept the above-named Laws and Statutes, that it shall be well lawful unto them of His said Council, and every of them, there to discharge them, without Indignation of the King Our Lord above named ;—And it is also the Will of the King that, if any of them, which God forefend ! do Aught to the Contrary of the Weal, Worship, and Profit of the King, His Laws, or His Realm, that that Person, who so shall be found, be punished duly, or put out of Council.”

“ Amongst which Names so assigned of the Council of the King Our said Lord, the Sire de Lovell was Oue. But the Chancellor of England rehearsed there, how that the said Sire de Lovell had oftentimes pursued unto the King, to have him excused of His said Council, for this, that certain Pleas were pending in the Courts of the King, which touched him ; Wherefore he would not be able honestly to occupy that Charge. For which Causes the King held him graciously for excused, pending the same Pleas. And the Other Lords, so chosen to be of the said Council, prayed unto the King to be excused of the same Council; and the King prayed them to be of His Council, as He them had prayed theretofore ; and so they obeyed the King’s Commandment. And, upon this, the said Lords prayed unto the King, that, since this Bill was the Will of the King, and of His proper Motion, and not at their Suit, that the same Bill might be entered of Record in Roll of Parliament. And also they prayed, that all the Matter, comprised in the



said Bill, might be executed according to the Content thereof. The which the King granted. And also the King commanded, that as well the said Bill, as the Request of the said Lords, might be enacted and enrolled in the same Roll of Parliament. And also the said Lords of the Council prayed that, during the Time of the said Parliament, all whereof the same Lords might bethink them, or be advised, for the Worship and Profit of the King, and of His Realm, might be adjusted unto the said Bill, and that that might be also entered of Record in Parliament. Whereunto the King did well agree Him" (*w*).

In after Times, the strange and absurd Blunder of a Palaiographer, or Clerk, in the Reading of a Word, First led to One important Deviation from antient Practice; and it has now acquired a Kind of Sanction from Use.

The Jealousy of Edward's Parliament, in One of the Instances last cited, was directed, not against any Excess of Privy Councillors, but against any Deficiency. In assigning unto Him the "Standing Council" of the Five acting Members, with the "Twelve" in Reserve, it was their Intention to prescribe, not the highest, but the lowest Number, of which that derivative Body ought to consist. Yet it has long been the Practice to consider the Privy Council as sufficiently constituted, for many highly important Purposes, by a mere Quorum of Two. That the Notion, however it originated, was from the Outset a most erroneous One, no Lawyer will venture to deny. That the Error First arose in the Way stated by Sir Francis Palgrave seems highly probable. "In a Case," says that learned Writer (*x*), "arising out of their supposed Jurisdiction, a Document was produced, which any Person, moderately acquainted with Records, would, I think, have

(*w*) III. Rot. Parl. 7 & 8 Hen. IV., No. 31, pp. 572-3.

(*x*) I. Cur. Regis. Introd. p. lxx. See also *Entick v. Carrington*, XIX. How. St. Tr. p. 1053.

expounded, as evidencing a Committal 'per Dnos (Dominos) de Concilio.' The Court admitted the Reading 'per Duos de Concilio.' Thus the ambiguous Form of a Letter vested in *any Two individual Members*, whose Signatures could be obtained, the Power, which, according to the Antient Constitution, belonged to the Lords of the Council, sitting in their Corporate Capacity, and as a Tribunal!"

The temporary Ascendancy of Royal Power, during the Fifteenth Year of Edward the Second, enabled that Monarch to obtain the Concurrence of His Parliament in an Enactment, which was intended to restrain the Assumption of Regal Authority, by powerful and discontented Councilors. This remarkable Document is to be found in the Collection of Statutes, compiled under the Authority of the Commissioners of Public Records (y).

In Form, as in Substance, it was merely declaratory of the Law, as it then existed and had of old Time been accustomed. The Ordinances of the Fifth Year of that Reign were revoked on the Ground of Illegality. It was then enacted, that, for ever thereafter, all Manner of Ordinances or Provisions, made by the Subjects of the King, or His Heirs, by any Power or Authority whatsoever, concerning the Royal Power of the King, or His Heirs, or against the Estate of the Crown, should be void and of no Avail whatsoever. But the Matters to be established for the Estate of the King and of His Heirs, and for the Estate of the Realm and of the People, should be treated, accorded, and established *in Parliaments by the King*, and by the Assent of the Prelates, Earls, and Barons, and the Commonalty of the Realm, *according as had been before accustomed*.

The Declaration is simply, that the Constitution of the Realm conferred no Power upon the Subject, to bind the

(y) 15 Edw. II. "Revocatio Novarum Ordinationum;" and see the Lords' First Report, pp. 282, 291—3, 472.

King, by Ordinance or Provision made without the Royal Authority. But it is also declared that the Prerogative, though absolute in its Nature, is in the Exercise limited and circumscribed. The King it is who "treats, accords, and establishes," the Matters that concern His own Estate, and that of His Realm and People. But it is "in Parliament," and by common "Assent" of Parliaments, that those Functions of Royalty are to be exercised. No new Privilege was given, no former Right was taken away, by that Enactment. That which it established was precisely that which, in the very Language of the Act, "had been before accustomed." The Position of the Parliament towards the King, and of both Parliament and King towards those powerful Bodies that were Derivatives of Parliament, remained unaltered. The old "accustomed" Modes of "treating, according, and establishing," the various Matters of Estate of which the Act makes Mention, far from being abrogated by that Enactment, were for ever after thereby strengthened and established.

The Statute, therefore, scarcely answers to the Character for Importance, which noble and learned Authorities have ascribed to it. But, if not a very important, it was, at least in one Sense, a very remarkable One. It was the First Statute which declared and defined the old and time-honoured Constitution of England. When such was necessary, the Value of the Constitution was already beginning to be lost. Tradition, when it assumes the Form of a Statute, ceases to be remembered—ceases to be Tradition. The Statute takes its Place!

Whilst the Silence of Law is the Token of a deep and sacred Sense of Justice within the Hearts of the People, every authoritative Declaration of Law presupposes Crime. Above all Comparison, great and numerous must have been the Crimes, which necessitated an Enactment, or Declara-

tion, of One of those fixed and fundamental Laws, on which the People's Existence reposes, and by which it is bound and kept together! The Multiplicity of Written Constitutional Laws, according to the great Writer cited in a former Lecture, proves nothing more than this, that Convulsion has multiplied, and that the Danger of Destruction is nigh at Hand. The Glory and the Greatness of England were coeval with Her Traditions. They date not from Statutes.

It was thus,—in the Beginning of the Fourteenth Century, and under the feeble Reign of a corrupt and despised King,—that the First Attempt was made to declare the Constitution by Statute. The Era of Traditions was even then departing. Reverence for the Past was even then giving Place to the Love of Legislation. The March of incipient Decline was even then rapid.

Yet the Term Decline is One of Comparison, and we who dare to use it live in 1845, and breathe in the Doctrines of 1688! In the Annals of degenerate States our Era has no Rival. There was never One, which more abounded in Statutes, that declared, aye! and enacted the Constitution;—and never One, more fruitful in Malversation, Conspiracy, Betrayal, and the scandalous Impunity of Culprits!

## LECTURE V.

## EDWARD THE SECOND TO JAMES THE SECOND.

"THE Pretence," says Hallam (*a*), "of levying Money, without Consent of Parliament, expired with Edward III., who had asserted it in the very last Year of His Reign." The same Writer, following Sir Matthew Hale and other Authorities, observes, upon this Immunity of the People from illegal Taxation, under the House of Lancaster, and thence down to the Reign of Mary,—(he might have said of James I.)—as One of the greatest Proofs of "the surprising Progress of the House of Commons." If the Maintenance of the Immunity in Question were indeed due to that House, (a Fact which nowhere appears,) the utmost which would have to be said of it would be, that the Rights, maintained from of old by the Local Guardians of the People, were not immediately abandoned to the Spoiler by those who had usurped their Trust.

But the Fact is far from clear. It is true that the Immunity did exist. It may also be true that Richard II. withheld His Hand, more out of Dread than Good-will. But Henry the Fourth, who came in by Parliamentary Title, to the Prejudice of the next rightful Heir,—Henry the Fifth, who added France to England's Transmarine Possessions,—and "the meek Usurper," Henry the Sixth, until his Deposition by the Yorkists,—were popular Sovereigns, to whom the Parliament was minded to deny Nothing, and to whom, therefore, there was but small Temptation to

(*a*) II. Middle Ages, p. 216. (Last Edition.)

tax without lawful Warrant. Edward the Fourth, Successor of the Lancastrian Prince, found England, after the Civil Wars were ended, in Repose at Home, and, for the First Time in that Century, in perfect Peace abroad. Hallam himself remarks, that his Demands of Subsidy must therefore have been moderate, and easily defrayed by a Nation, rising in Opulence, under what was still a Reign of Terror (*b*). According to Sir John Fortescue, nearly One-Fifth of the whole Kingdom had come to the King's Hand by Forfeiture, since the Beginning of His Reign (*c*). Another Period of Civil War and Confiscation brings us to the long and frugal Reign of Henry the Seventh, the Founder of that Policy, which outlasted the House of Tudor, and first reached its Perfection under His Descendant Elizabeth. Independently of the vast Accessions of Property, derived from the Confiscations of Church Estates, and others, during the following Reigns, it is obvious that the united Successions of York and Lancaster, in the Person of Henry the Seventh,—embracing, as these did, the Forfeitures which had supervened, from the Deposition of Richard the Second to the Accession of the King—must have given to Henry a great Income. That Income, with the Grants by Parliament, the Droits and Duties, the Profits of Tenure and other Matters of Revenue, He managed with much Economy. Thus He rendered Himself in a very great Measure independent of the Parliament, and in particular of that House, whose sole Importance consisted in its holding the Purse-strings of the Nation. That such a King should not have taxed such a People, otherwise than by the Assent of Parliament, may well be credited, without attributing too much to the Firmness of that Body, which had already granted Him Tonnage and Poundage for His Life, and which, after

(*b*) II. Middle Ages, pp. 327—30.

(*c*) Absolute and Limited Monarchy, p. 83.

His Death, renewed the same to His Successor. The Power of the Crown during Their Reigns, and those of Their immediate Successors, was so high above the Control of Parliament, that They used both Houses as the merest Instruments of Their despotic Will (*d*). How similar the Kingly Independence of England's Norman Conqueror, and yet how unlike!

So far from taking Pride with the Whig Historian in these Reminiscences, the Patriot deploras them. They recall the bloody Triumphs of Faction; the Growth of Tyranny and Sedition; the Contempt of Laws; the Destruction of private and local Rights; the undue Exaltation of Central Power; the Spread of Rapine and Corruption. The Civil War, when it raised the Tudor to the Throne, had lasted Fourscore Years. It was undertaken to assert the Parliamentary Title of One Pretender to the Throne, and it ended in the Establishment of Another. It was not the Deposition or Abdication of King Richard the Second that caused the War. That Act was a righteous and lawful One. Nor had the parallel Proceeding in the Case of Edward the Second been followed by any such Convulsions. It was not the Deposition of the King, but the Choice of the Successor! Thence the Wars of the Roses, which destroyed the Baronage of England, and deluged Her Fields with Blood. Twice, in the Accession of Henry Bolingbroke, as in that of Henry Tudor, the Law was solemnly broken, and the Throne removed from Its Place. Edward the Third was Heir to the Father, whom He succeeded. But, to make way for those Princes, in each Case the lawful Heir was set aside, and the Succession diverted into other Families, under Pretence of a Parliamentary Title. A Title that disowned the Law!

Yet, unto every Sin that is committed, there belongs its

(*d*) Lords' First Report, p. 372.

own Reward. By the bloody Wars,—which followed the First, and ushered in the Second of these two Usurpations, and destroyed nearly all the Great Families, and reduced the Estate and Power of Parliament,—the Way was prepared for those Assumptions of Power by rapacious Tudors and false Stuarts, which again produced the Great Rebellion under Charles the First, and the successful Rebellion of 1688; that terrible Snow-wreath on which our present Constitution is supposed to be based (e).

Such were the deplorable Triumphs of Centralisation. But they were not realised all at once, nor without much Resistance from the stubborn Attachments of the People. Traces of the Collision, between the dominant Factions of Westminster, and the expiring Liberties of the Shire, the Hundred, and the Town, appear at Intervals, until a comparatively late Period in our Annals. It may even be said that the Acts of Union, between England and Scotland, and between Great Britain and Ireland, swept away the Last of those antient Vestiges.

The Effect of such Enactments was to give to the Usurpations of Party the Sanction and Solemnity of public Law. They were made to wear the Form, and to speak the Language, of National Compacts. The Three Nations seemed to be the Parties to those Compacts, and, as against each other, to guarantee their Fulfilment.

Those Enactments, as they violated Popular and Private Rights, so they crippled and took away Prerogatives of the Crown. The Crown was wounded in its most undoubted Prerogative, that of Advice. By Virtue of that Prerogative it had claimed, and from Time to Time exercised, the Right of summoning to its High Court of Parliament, Knights, Citizens, and Burgesses, representing Places not formerly represented. This Right, according to the Com-

(e) Lords' First Report, p. 348.



mittee of the Lords, although exercised until a very late Period, must now be considered to have been virtually taken away by the Terms of the Compacts of Union between the Three Kingdoms, so far as the Commons are concerned (e). If that be so, the Reform Acts have but increased the Mischief.

The Municipalities of the City, Borough, and Town, had fallen into Decay. Those of the Rural Districts, so far as they respected the Exercise of Municipal Functions, had long since ceased to appear. One or Two of them, indeed, struggled on for a while, but their Tenacity of a Life, which their Fellows had peacefully breathed out, was a Crime unpardonable in the Sight of Imperial Legislation. It was punished by Confiscation of Rights and Usurpation of Duties ; that is to say, by Acts of Parliament for the Resumption of Franchises, for the Extension of Acts of Parliament, and for the better Administration of Justice.

Thus, by the 11th Henry VII. c. 9, were North and South Tyndale, and all the Lands within the same, made, for the First Time, " Guildable," and Parcel of the County of Northumberland ; and no Franchise should be there ; but all the King's Writs should be obeyed. Thus also, by the 27th Henry VIII. cc. 7, 24, and 26, Wales was incorporated, united, and annexed to and with the Realm of England, and allowed the Benefit of English Laws,—such as those Laws had become in the Reign of Henry the Eighth,—and the Administration of Justice, according to the same, and the then prevailing Methods of Administration. Twelve Welsh Shires were constituted by the Last of those Acts ; and then the Remainder of Wales was annexed to English Shires ;—and Provision was made for the Representation of the Whole in the Lower House of Parliament.

But Wales was the Fruit of Conquest. Her Laws and

(e) First Report, p. 391.

Institutions were sanctioned by long and imprescriptible Tradition,—Source of the whole Common Law,—but not by Charter, nor by Treaty, far less by Act of Parliament. Common Law itself, unsupported by these, could not command much Favour, in the Days of Henry the Eighth, and His Parliament. It is not wonderful that Wales should have succumbed to the cold Blast, which wasted and laid low the Liberties of England.

The Second of the Two last-mentioned Enactments, intituled “An Act for recontinuing Liberties in the Crown,” went far to accomplish that Object. “*Quælibet Libertas Regia est, et ad Coronam pertinet,*” was, as was shown in a former Lecture, always the Language, which the Constitution used, to denote the Source of Jurisdiction and Government. In the Mouths of Tudor Legists, it was now made the Apology for Usurpation and Extinguishment. “Divers,” says the Preamble, “of the most antient Prerogatives and Authorities of Justice, appertaining to the Imperial Crown of this Realm, had been severed and taken from the same, by sundry Gifts of the King’s most noble Progenitors, Kings of this Realm, to the great Diminution and Detriment of the Royal Estate of the same, and to the Hinderance and great Delay of Justice.” “For Reformation whereof,” it was enacted; that the King’s Highness, His Heirs and Successors, should have the whole and sole Power and Authority of Pardon,—in Treasons, Murders, Manslaughters, Felonies, Outlawries, and so forth,—united and knit to the Imperial Crown of the Realm; any Grants, Usages, Prescriptions, Act or Acts of Parliament, or other Thing, to the Contrary notwithstanding. Justices were no longer to be made, but by the King,—whether of Eyre, of Assise, of Peace, or of Gaol Delivery; and whether in Shire, County, County Palatine, or elsewhere within the Realm, in Wales, the Welsh Marches, or any other the King’s

Dominions;—saving only to English Cities, Boroughs, and Towns Corporate, their Justices of Peace, and Gaol Delivery, and certain minor Privileges. All Original and Judicial Writs, and all Indictments, and all Criminal Process, in every such County Palatine and Liberty, were to be made only in the King's Name; and the King's Peace, and none other, was to be proclaimed within the same. The odious Commissions of Purveyance were to be exercised under Colour of Law, and by Authority of Parliament,—as well within Liberties, or Franchises, as without; so that the Purveyors confined themselves to the Functions, assigned them by the Favour of Parliament, as signified by Statute. Franchises held by the Crown were exempted from this Resumption Act; and, by an extraordinary Concession, it was provided, that the Bishop of Ely and his Steward, the Bishop of Durham and his Chancellor, and the Archbishop of York and his Chancellor of Hexhamshire, should be Justices of the Peace, within those their respective antient Jurisdictions.

The Influence, which moved King Henry's Parliament to invade Rights, was sometimes employed to induce the Lieges to surrender them. The famous Act of Supremacy is a familiar Instance of the Operation of this Method upon the Franchises and Liberties of the Episcopal Hierarchy, and the Secular Clergy. The Acts for the Dissolution of Monasteries are similar Instances, with Respect to the Religious Orders. Of the Working of the same System upon the Rights of the Laity, "the Act for making of Knights and Burgesses within the County and City of Chester," affords a significant Example.

In that Act (34th and 35th Hen. VIII. c. 13), "the Inhabitants of His Grace's County Palatine of Chester," appear, in the prominent Character of Petitioners "to the King their Sovereign Lord," and, "in most humble Wise,

shew, unto His Excellent Majesty," the then actual "Exemption, Exclusion, and Separation," of their Jurisdiction, from that of the King's "High Court of Parliament." They are then made to complain of "the manifold Disherisons, Losses, and Damages," which they say they have sustained by Reason thereof. They then go on to allege (with how much Truth you may determine), that the Inhabitants of the County "have always hitherto been bound by the Acts and Statutes, made and ordained by His said Highness, and His most noble Progenitors, by Authority of the said Court, as far forth as other Counties, Cities, and Boroughs, have been, that have had their Knights and Burgesses within His said Court of Parliament"—They are next made to refer, but in very general Terms, to the Statute of the Twenty-Seventh of the King, already noticed; and they do so by denouncing it as an Usurpation (which it most undoubtedly was), and by coupling it, as such, with other "Acts and Statutes, made within the said Court, as well derogatory unto the most antient Jurisdictions, Liberties, and Privileges, of the said County Palatine, as prejudicial unto the Commonwealth, Quietness, Rest, and Peace, of His Grace's most bounden Subjects inhabiting within the same." These Usurpations, whereby they are so "touched and grieved," would not, as they proceed to argue, have been possible, but for the Circumstance that, albeit always bound by the Acts and Ordinances of the King, made in His said Court, they, the Inhabitants aforesaid, had "neither Knight or Burgess there, for the said County Palatine." For those Reasons, it was accordingly enacted,—not that the usurped Franchises should be restored, but—that from the End of the Session, the said County Palatine should have Two Knights, and the City of Chester Two Burgesses for the Parliament; to be elected by Process out of the English Chancery. A notable Example

of that Parliamentary Morality now so prevalent, which acknowledges the Crime that is past, but to make of it a Precedent to justify other Crimes which are to come; and regards, in every unaccomplished Crime, nothing beyond the Necessity of accomplishing it!

It would appear from the 25 Car. II. c. 10,—intituled “An Act to enable the County Palatine of Durham to send Knights and Burgesses to serve in Parliament,”—that the Inhabitants of that County Palatine had, in like Manner—but whether by Non User or by Surrender does not appear—already lost its antient Exemption from Contribution to Aids and Subsidies, except by its own Grant. The Act recites, that the Inhabitants had not, thitherto, had the Liberty and Privilege of electing and sending any Knights and Burgesses to the High Court of Parliament; although the Inhabitants of the said County Palatine were liable to all Payments, Rates, and Subsidies, granted by Parliament, equally with the Inhabitants of other Counties, Cities, and Boroughs, in this Kingdom; who had their Knights and Burgesses in the Parliament; and were therefore concerned equally with others, the Inhabitants of this Kingdom, to have Knights and Burgesses in the said High Court of Parliament, of their own Election, *to represent the Condition of their County*, as the Inhabitants of other Counties, Cities, and Boroughs, of this Kingdom had. It was therefore enacted, that Two Knights should be thenceforward returned for the County, and Two Burgesses for the City of Durham, to Parliament.

From the Passing of this Act, down to our own Times, the Union Acts between the Three Kingdoms were the only new Measures of Importance passed directly for the further Promotion of central Government. The Mischief was already so near its Height, that it perhaps needed but those two Usurpations to perfect it.

I must here revert to the Opinion expressed by the Committee of the House of Lords, as to the Effect of these Union Acts. The undoubted Prerogative, vested in the Crown, of summoning to its Councils, what Commons and from what Localities the Sovereign thought fit, was, as I have remarked, directly struck at by those Enactments, at the same Time that they violated the Rights and Liberties of the Subjects ; and their Lordships, as you will remember, were of Opinion, that thereby that Prerogative was not only struck at, but virtually taken away. That it is virtually suspended, so long as those Acts are suffered to bind it, I make no Doubt ;—but is it taken away ? Is it even suspended,—but by the Compliance of the Sovereign with Enactments, inoperative to constrain Her to obey ? Let me suppose an Emergency,—always possible, and in these Times perhaps something more than possible ;—an Emergency, of such a Character, as to make it desirable for Her Majesty to seek the Advice and Aid of all Estates and Conditions of Her Subjects. Is She not entitled to do so in every Realm and Province, in every Shire and City, in every Hundred, Borough and Town, within Her wide Dominions ? And are not they free to yield Obedience to the Royal Mandate ? But, where Trusts are in Question, the Right to possess the Office is the Measure of the Obligation to perform. If She do indeed enjoy that Prerogative, She cannot, without heinous Guilt, neglect to use it when the Occasion demands. If the Subject may obey that Prerogative, he is bound to obey it. These are Duties which it transcends the boasted Power of Parliament to fetter or impair. How then can the Union Acts operate to their Prejudice ?

That was a Question, asked when they were under Discussion in Parliament,—and asked in vain—and it remains unanswered to this Hour. In Fact, as a very distinguished Scottish Diplomatist of our own Time has remarked, the

future Restoration of the Parliament of Ireland is a Return that has been prognosticated,—as the Irish Union Act was a Change denounced,—at the Time, by the best Lawyers, the greatest Patriots, and the most revered Names. It was agreed, by the greatest of the legal Authorities of either Faction, Plunkett and Saurin, that the Repeal of the Union, and the Extinction of the Parliament of Ireland, was what neither the Parliament of England nor of Ireland could legitimately do. The Irish Parliament could not extinguish itself, and the English Parliament could not decree such an Extinction.

“I tell you,” was the Declaration of Lord Plunkett, in particular, during the Discussion of the Union Act in the Irish House of Commons, “that if, circumstanced as you are, you pass this Act, it will be a Nullity, and no Man in Ireland will be bound to obey it. You have not been elected for this Purpose. You have been appointed to make Laws, not Legislatures. You are appointed to act under the Constitution, not to destroy it. You are appointed to exercise the Functions of Legislators, not to transfer them. And,” concluded that eminent Lawyer and Statesman, “if you do so, your Act is a Dissolution of the Government, and no Man in the Land is bound to obey you! Do not dare to lay your Hands upon the Constitution! It is above your Power!”

Nearly Twenty Years later, and by a greater Judge, the same Thought was expressed in nearly the same Language. “The Legislature,” said Lord Stowell (*f*), “must be understood to have contemplated all that was in its Power, and no more.” As to the Extent and Limits of that Power, you will do well to consider what an Act of Parliament is;—after which you will be the better able to ascertain the Degree of Worth there is, in the following extravagant Expressions of Blackstone.

(*f*) The Le Louis, 2 Dods. Ad. R. p. 235.

“Parliament has Sovereign and uncontrollable Authority, in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of Laws ; concerning Matters of all possible Denominations, Ecclesiastical or Temporal, Civil, Military, Maritime, or Criminal ;—this being the Place, where that absolute, despotic Power, which must, in all Governments, reside somewhere, is entrusted by the Constitution of these Kingdoms ! It can change, and create afresh, even the Constitution of the Kingdom, and of Parliaments themselves ! It can, in short, do every Thing, that is not naturally impossible. And therefore, some have not scrupled to call its Power by a Figure rather too bold, *the* Omnipotence of Parliament ! True it is, that what the Parliament doth, no Authority upon Earth can undo” (g).

It is evident, that so false and mischievous an Estimate,

(g) I. Bl. Comm. p. 173. “When I use the Word Law, I mean that Rule of antient Justice which has been preserved in our Common Law, and not the Statutes of Parliament. There was a Time, when Parliament was the Servant of the Laws, their Expounder and Enforcer ; now Parliament has desecrated Law, by pretending to be its Source. Parliament first rendered Judgments, as a Court of Law ; it then proceeded to declare the Law (Edward II.), then to limit it, and lastly, ‘to give,’ as Sallust remarks of the Senate of sinking Rome, ‘the force of Law to the Decisions of their own Order.’ The Parliament in England could not enforce their Decrees, but we accepted them. We gave the Title of Law to Abuses which could not have prevailed if known by their proper Name. This Usurpation, thus accepted, the Nation continues to enforce upon itself, by speaking of the Omnipotence of Parliament ; a Word which reveals,—not only that Parliament has really usurped, but,—that the Nation has voluntarily surrendered. There remains, however, upon the Bench and at the Bar, a Tradition of better Things. No Age has been without a Witness, to testify that the Law is the only Mistress of England, and a Protest against any Power in Parliament, or any binding in its Statutes, beyond that which is derived from that very Law that is set at nought. No Man will deny that the Unwritten and the Written Laws of En-



of the Nature and Capacity of Bodies, charged with the Functions of Legislation, must be at least as serviceable to the arbitrary and corrupt Designs of their Ministers, as ever the wildest Doctrines of Prerogative Lawyers were to those of the Crown.

"The Courts of Common Law," said the late Lord Stowell (*h*), "have their Unwritten Law,—the approved Principles of Natural Reason and Justice. They have likewise the Written or Statute Law, in Acts of Parliament, which are directory Applications of the same Principles to particular Subjects, or positive Regulations consistent with them, upon Matters, which would remain too much at Large, if they were left to the imperfect Information, which the Courts could extract from mere general Speculation." In Fact, as we have seen in a former Lecture, Acts of Parliament are the Decrees and Judgments of that High Court, by which the Common Law is to be applied and carried out, in each Emergency, as it arises.

At the present Era, doubtless, they are all considered rather as new Laws, than as judicial Declarations of Laws

gland are the two Systems the most opposed that can be imagined; and, as all will admit, that the Unwritten Law is the best that any Nation can possess, so must it follow that the Written is the Worst. This is no theoretic Antagonism. These Systems are bodily represented in our Government by the Judicatories and the Parliament. And, now that Schism and Faction have destroyed even the Thought of Resistance to the Commons, either by the Crown, or the Church, or the Peers—now that Betrayal can be no more resented by its Constituents, than Usurpation by its Superiors, or co-ordinate Estates—there remains over it but one only Check—for us; one only Protection, and that is—the Courts of Justice. And what is the Law, save the Knowledge of the Past—the Study of their Thoughts—and the Adaptation of their common Practice to the present Times?" (Urquhart's Lectures on Pauperism, 1845.)

(*h*) "The Fox;" Edw. Adm. R. pp. 312—13.

previously subsisting. But, even so, it was well said, by the greatest Jurist and Statesman, and, perhaps, the greatest Man of modern Times, I mean Edmund Burke, that, if the People were mad enough, to make an express Contract, that should release their Magistrate from his Duty, that Covenant would be void. The Acceptor of it has not his Authority increased, but his Crime doubled. Those who give, perform acts,—that are void as they are given,—good and valid only, as tending to subject themselves, and those who act with them, to the divine Displeasure; because, morally, there can be no such Power. Those who give, and those who receive, are equally criminal; and there is no Man but is bound to resist it, to the best of his Power, wherever it shall show its Face. Nothing but absolute Impotence can justify Men in not resisting it to the utmost of their Ability. We may bite our Chains as we will. But we shall be made to know ourselves, and be taught that Man is born to be governed by Law; and He, that will substitute Will in Place of it, is an Enemy to God (h)!

In one of his earlier Works (i), he enters into this Question more at large.

To the solid Establishment, he says, of every Law, two Things are essentially requisite;—First, a proper and sufficient human Power, to declare and modify the Matter of the Law; and next, such a fit and equitable Constitution, as they have a Right to declare and render binding. With Regard to the First Requisite, the human Authority, it is their Judgment that the Citizens give up; not their Right. The People, indeed, are presumed to consent to whatever

(h) Speech on Hastings' Impeachment, Fourth Day, Vol. VII. of Works, pp. 117—19. (American Edit.)

(i) Tracts on the Popery Laws, Vol. V. of his Works, p. 254. (American Edit.)

the Legislature ordains for their Benefit ; and they are to acquiesce in it ; though they do not see clearly into the Propriety of the Means, by which they are conducted to that desirable End. This they owe, as an Act of Homage and just Deference, to a Reason, which the Necessity of Government has made superior to their own. But, though the Means, and, indeed, the Nature, of a Public Advantage may not always be evident to the Understanding of the Subject, no One is so gross and stupid, as not to distinguish between a Benefit and an Injury.

But, if we could suppose that such a Ratification was made, not virtually, but actually ; by the People, not representatively, but even collectively ; still it would be null and void. They have no Right to make a Law prejudicial to the whole Community ; even though the Delinquents, in making such an Act, should be themselves the chief Sufferers by it ; because it would be made against the Principle of a superior Law, which it is not in the Power of any Community, or of the whole Race of Man, to alter,—I mean, the Will of Him who gave us our Nature, and in giving, expressed an invariable Law upon it. It would be hard to point out any Error, more truly subversive of all the Order and Beauty—of all the Peace and Happiness—of human Society, than the Position, that any Body of Men have a Right to make what Laws they please ; or that Laws can derive any Authority from their Institution merely, and independent of the Quality of the Subject Matter. No Arguments of Policy, Reasons of State, or Preservation of the Constitution, can be pleaded in Favour of such a Practice. They may, indeed, impeach the Frame of that Constitution, but can never touch this immoveable Principle. This seems to be, indeed, the Doctrine, which Hobbes broached in the last Century, and which was then so frequently and so ably refuted. Cicero exclaims, with the utmost Indignation and

Contempt, against such a Notion (*k*). He considers it not only as unworthy of a Philosopher, but of an illiterate Peasant; that, of all Things, this was the most truly absurd, to fancy that the Rule of Justice was to be taken from the Constitutions of Commonwealths, or that Laws derived their Authority from the Statutes of the People, the Edicts of Princes, or the Decrees of Judges. If it be admitted that it is not the Black-Letter and the King's Arms that make the Law, we are to look for it elsewhere.

In Reality, there are Two, and only Two, Foundations of Law; and they are both of them Conditions, without which Nothing can give it any Force; I mean Equity and Utility. With respect to the former, it grows out of the great Rule of Equality, which is grounded upon our common Nature, and which Philo, with Propriety and Beauty, calls the Mother of Justice. All human Laws are, properly speaking, only declaratory. They may alter the Mode and Application, but have no Power over the Substance of original Justice. The other Foundation of Law, which is Utility, must be understood, not of partial or limited, but of general and public Utility; connected in the same Manner with, and derived directly from, our rational Nature;—for any other Utility may be the Utility of a Robber, but cannot be that of a Citizen; the Interest of the domestic Enemy, and not that of a Member of the Commonwealth. Law is a Mode of human Action respecting Society, and must be governed by the same Rules of Equity which govern every

(*k*) Cicero de Legibus, lib. prim. 15 et 16. O Rem dignam, in qua non modò docti verum etiam agrestes erubescant! Jam verò illud stultissimum, existimare omnia justa esse, quæ scita sunt in Populorum Institutis aut Legibus, &c. Quod si Populorum Jussis, si Principum Decretis, si Sententiis Judicum Jura constituerentur, Jus esset latrocinari, Jus adulterare, Jus Testamenta falsa supponere,—si hæc Suffragiis aut Scitis Multitudinis probarentur.

private Action ; and so Fully considers it in his Offices as the only Utility agreeable to that Nature—*Unum debet esse omnibus propositum, ut eadem sit Utilitas uniuscujusq; et universorum, quam si ad se quisq; rapiat, dissolvetur omnis humana Consortio.* If it were true, (as it is not,) that the real Interest of any Part of the Community could be separated from the Happiness of the Rest, still it would afford no just Foundation for a Statute, providing exclusively for that Interest, at the Expense of the other ; because it would be repugnant to the Essence of Law ; which requires that it be made as much as possible for the Benefit of the Whole. If this Principle be denied or evaded, what Ground have we left to reason on ? We must at once make a total Change in all our Ideas, and look for a new Definition of Law. Where to find it I confess myself at a Loss. If we resort to the Fountains of Jurisprudence, they will not supply us with any that is for our Purpose.—*Jus* (says Paulus) *pluribus Modis dicitur; uno Modo, cum id quod semper æquum et bonum est, Jus dicitur, ut est Jus naturale; altero Modo, quod omnibus aut pluribus in unâquâq; Civitate utile est, ut est Jus civile.* There is no other to be found in the whole Digest ; neither are there any modern Writers, whose Ideas of Law are at all narrower.

It would be far more easy to heap up Authorities on this Article, than to excuse the Prolixity and Tediousness of producing any at all, in Proof of a Point, which, though too often practically denied, is, in its Theory, almost self-evident. For Suarez, handling this very Question,—*utrum de Ratione et Substantiâ Legis esset ut propter commune Bonum feratur*, does not hesitate a Moment ;—finding no Ground, in Reason or Authority, to render the Affirmative in the least Degree disputable. In *Questione ergo propositâ* (says he), *nulla est inter Authores Controversia ; sed omnium commune est Axioma, de Substantiâ et Ratione Legis,*

esse, ut pro communi Bono feratur; ità ut propter illud præcipuè tradatur; having observed, in another Place, contra omnem Rectitudinem est, Bonum commune ad privatum ordinare, seu Totum ad Partem propter ipsum referre. Partiality and Law are contradictory Terms. Neither the Merits nor the ill Deserts, neither the Wealth and Importance, nor the Indigence and Obscurity, of the One Part or of the Other, can make any Alteration in this Fundamental Truth. On any other Scheme, I defy any Man living, to settle a correct Standard, which may discriminate between equitable Rule and the most direct Tyranny. For, if we can once prevail upon ourselves to depart from the Strictness and Integrity of this Principle, in Favour even of a considerable Party, the Argument will hold for One that is less so; and thus we shall go on, narrowing the Bottom of Public Right, until, Step by Step, we arrive, though after no very long, or very forced, Deduction, at what One of our Poets calls the enormous Faith;—the Faith of the Many, created for the Advantage of a single Person.

Suppose, for instance, an Act of Parliament to be made against the Law of Nations. That Act is null and void. It is not given to the Legislature of any State to make Laws to affect, though it be to ameliorate, the Condition of its Neighbours. The Courts, it is true, will make every Construction of an Act of Parliament, rather than hold it derogatory to the Law of Nations. If they can, they will say, with Lord Mansfield, the Act did not intend to alter the Law of Nations. But, if such a Construction be inevitable, then they will hold the Act itself null and void; as “not warranted by the Law of Nations; that Universal Law, which will be carried as far in England as any where; which, as it is rather the Duty of the Courts to extend than to narrow, so it is here adopted in its full Extent, by the Common Law, and is held to be a Part of the Law of

England itself; which Acts of Parliaments cannot alter; which is to be collected, together with the Rules of Decision concerning it, not from Acts of Parliaments, but from the Practice of different Nations, and the Authority of Writers;—and fixed and evidenced, by general and antient, and admitted Practice, by Treaties, and by the general Laws and Ordinances, and the formal Transactions of Civilised States;—of which Acts of Parliaments have, from Time to Time, been made to enforce, or Decisions to facilitate, the Execution,—and are, therefore, to be considered, not as introductive of any new Rule, but merely as declaratory of the old fundamental Constitutions of the Kingdom;—and, finally, without which, the Kingdom itself must cease to be a Part of the civilised World” (l).

This Proposition grounds itself upon Maxims of universal Obligation. It belongs to the very Nature of Things. It is One which, the Municipal Laws of England, and of every State, concur with the Law of Nations to establish.

No Sovereign whatsoever has the Right to enact Laws to govern, in Relation to their Property, any Persons, other than such as are within the Reach of His Sovereignty (m). *Extra Territorum Jus dicenti impunè non paretur* (n). Nor can the relative Strength, or Weakness, of States produce any Difference, in Regard to this Question of Public Rights, and Public Duties. Relative Magnitude, says Lord Stowell (o), creates no Distinction of Right. Relative Imbecility, whether permanent or casual, gives no additional Right to the more powerful Neighbour; and any Advantage, seized

(l) *Heathfield v. Chilton*, 4 Burr. 2016; *Barbuit's Case*, Ca. Tem. Talbot, by Forrester, 282; *Triquet v. Bath*, 3 Burr. 1840—1; *Viveash v. Becker*, 3 M. & S. 298; the *Le Louis*, 2 Dods. Ad. R. 249; IV. Bl. Comm. p. 60.

(m) I. *Boullenois des Statuts*, pp. 2, 3, 4.

(n) Dig. Lib. II. Tit. 1, l. 20.

(o) 2 Dods. Ad. R. 243.

on that Ground, is mere Usurpation. Whatever is lawful for One Nation is equally lawful for another; and whatever is unlawful in One, is equally so in another (*p*). Sovereignty, united with Domain, establishes the exclusive Jurisdiction, over Controversies, Crimes, and Rights, therein arising (*q*). This common and fundamental Law of Nations is, of Necessity, the Municipal Law of every Nation. It is One of those Laws, which never required the Consent of Princes for its Establishment, and which no Congress of Princes is competent ever to take away (*r*).

Neither the British Act of Parliament, said that great Judge, on the same Occasion, nor any Commission founded on it, can affect any Right or Interest of Foreigners, unless they are founded upon Principles, and impose Regulations, that are consistent with the Law of Nations. That is the only Law which Great Britain can apply to them; and the Generality of any Terms, employed in an Act of Parliament, must be narrowed in Construction, by a religious Adherence thereto. The Legislature must be understood to have contemplated all that was in its Power; and no more (*s*).

Again,—“the Law of Reason,” says St. Germain (*t*), “runneth with every Man’s Law, and also with the Law of God, as to the Deeds of Man, and must be also kept and observed; and shall always declare what ought to follow upon the general Rules of the Law of Man, and shall restrain them if there be anything contrary to it. If any general Custom were directly contrary against the Law of God, or if any Statute were made directly against it;—as, if it were ordered that no Alms should be given, for no Necessity, the Statute and Custom were void.”

(*p*) Vattel, Préf. secs. 15—20, B. 2. Ch. 3, secs. 35—6.

(*q*) *Ib.* B. 2. Ch. 7, sec. 84—5.

(*r*) See *per* Lord Stowell, in 2 Dods. Ad. R. 252.

(*s*) The *Le Louis*, 2 Dods. Ad. R. pp. 239, 254.

(*t*) Doctor and Student, 1st Dialogue, Chapters 2, 16, pp. 7, 15.



“The Parliament,” according to Lord Coke (*u*), “cannot take away that Protection, which the Law of Nature giveth unto a Man. And, therefore, notwithstanding, by the Statute of 25 Edw. III. c. 22, a Man, attainted in a Præmunire, is by express Words out of the King’s Protection,—generally the King may protect and pardon him.”

Elsewhere, his Lordship, almost in the Words of St. Germain, asserts the Supremacy of traditionary over Statute Law, as the Ground Work of this Doctrine. His Language is remarkably strong (*x*).

“In many Cases, the Common Law will control Acts of Parliament, and sometimes adjudge them to be utterly void. For, when an Act of Parliament is against common Right and Reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void.”

A Proposition, which was warmly eulogised in modern Times, by Lord Holt, then Lord Chief Justice of England, under King William the Third.

“It is a very reasonable and true Saying,” he observes (*y*), “that, if an Act of Parliament should ordain that the same Person should be Party and Judge, it would be a void Act of Parliament. An Act of Parliament can do no Wrong; though it may do several Things that look pretty odd. But it cannot make One that lives under a Government Judge and Party. It may not make Adultery lawful;” &c.

“An Act of Parliament,” says Lord Hobart, to the same Effect (*z*), “may be void from its First Creation, as an

(*u*) Calvin’s Case; 7. Report, p. 14.

(*x*) Bonham’s Case; 8. Report, p. 118.

(*y*) City of London *v.* Wood, 12. Modern Report. p. 687.

(*z*) Hob. R. p. 87. Compare, with these Authorities, Mr. Hill’s learned Argument in the Baron de Bode *v.* The Queen;—Hil. T. 1845, Q. B.;—(pp. 167, 251—2).

Act against natural Equity. For *Jura Naturæ sunt immutabilia; sunt Leges Legum.*"

Thus, too,—and as it is the last Authority which I shall cite to you, so it is almost literally applicable to the Subject, which has led to the present Digression,—Lord Coke mentions a Case, where it was held, "against the express Purview of an Act against Sheriffs serving (the King), for more than a Year, (passed in the Reign of Henry the Sixth,)—by which the King's Dispensing Power was in express Words taken away—that the King might specially dispense with the Act; for that the Act could not bar the King of the Service of His Subject, which the Law of Nature did give unto Him." "No Act," he repeats in another Place (*a*), "can bind the King from any Prerogative, which is sole and inseparable to His Person; as a Sovereign Power to command any of His Subjects to serve Him for the *Public Weal*. And this, solely and inseparably, is annexed to His Person. And this Royal Power cannot be restrained by any Act of Parliament, neither in *Thesi* nor in *Hypothesi*; for upon Commandment of the King, and Obedience of the Subject, doth His Government consist."

I am aware, that it has been said, that certain Consequences, which are supposed to result from the Proposition, that the Royal Prerogative of Counsel is not, and cannot be, affected by any of the Union or Annexation Acts, constitute a grave Objection to its Credit. But, if the Supposition were well founded, it could not decide this Question. The Law, as is justly remarked by the anonymous Author of a recent Treatise (*b*), is not to be departed from, merely because certain Consequences are apprehended from the Endeavour to enforce it. But, in

(*a*) Case of *Non Obstante*, 12. Report, p. 18.

(*b*) Case of the Baron de Bode *v.* The Queen, (1844) p. 63; and see per Lord Brougham, in *Hill v. Bigge*, 3 Moore's Pr. C. Cases, pp. 476—81.

Fact, the Consequences apprehended are purely imaginary. It is not true that the Statutes, passed by the United Parliament, depend for their Validity upon the Union Act. The Union has Aspect to the Parliament of either Country, not to their common Sovereign. It is in the Sovereign that the Supreme Legislative Power is vested. Parliament does but advise the Crown in the Exercise of that Prerogative. Acts of Parliament are equally valid, whether the Parliaments in which they were made were validly summoned or not. It is only by the Royal Assent that the Force of Law is given to the Statute. The Statutes of even usurped Princes,—or of Princes so styled by successful Usurpation,—were held ever binding upon those who came after them. Edward IV. had to give Effect to all the Acts of Henry VI.; and Henry to those of Edward; and the Acts of Richard III.,—even Attainder Acts against the Adherents of Richmond, passed—were, by the Judges of Henry VII., declared to be in Force, and the Victors still under Attainder;—notwithstanding the Battle of Bosworth (c).

In the Eleventh Year of the same King, this constitutional Doctrine was asserted and declared by Statute. The Purport of the Statute is expressed in the Title, which is thus:—"An Acte that noe Pson going w<sup>th</sup> the Kinge to the Warres shal be Attaynt of Treason" (d). This Act has been sometimes supposed to be introductory of a new Law. It was nothing of the Kind. The Law, as you have seen, was well established long before the Act; and the Preamble contains a Declaration to that Purport. It is the

(c) 3 Edw. IV. f. 24; 4 Edw. IV. f. 20; 9 Edw. IV. f. 1, Br. Abr. *Treason*, Pl. 10, M. 1 Hen. VII. f. 4. b. (Pl. 5); and compare Higden's "View of the English Constitution," (London, 1710,) pp. 7—69, (3rd Edit.)

(d) Statutes of the Realm (Authorised Collection), 7 Henr. VII. c. 1.

common Vice of a Parliamentary Race, to detract from the Common Law the Glory which they bestow upon their own Legislation.

But if, to the Validity of the Statute, it was enough, that the Crown was on His Head, although by Usurpation, who gave it the Sanction of His Assent, much more should the Sanction of a rightful King confer Validity upon the Act of an unlawful Parliament. One signal Example occurs to me.

In the Twenty-First Year of King Richard the Second, a Parliament was holden at Westminster, which, although, to all Appearance, regularly and formally convened, had not, in Point of Fact, been summoned and elected according to Law. Neither could it act with Freedom, when assembled. "The King caused to be summoned all the Lords unto Him adherent," it is said, but none other; and the "Commons were not elected, as Custom doth require, but by the Royal Pleasure." And, further, that Parliament, when they met, found themselves "surrounded with armed Men and Archers numberless," and so were forced to execute the King's Will, "by Pressure of the Folk, which were by Him unto that End assembled (e)." It was by the Instrumentality of such a Parliament, and under such Circumstances, that Enactments were made, to the Effect, "that all the Judgments, Ordinances, Declarations, and Establishments made in this present Parliament, be held and declared for Statutes, and hold Force and Vigour of Statute in all Points (f);" and that "the Parliament, holden in the Eleventh Year of the King, should be utterly annulled and holden for null; as a Thing done without Authority, and against the Will and

(e) 1 Henr. IV. *nn.* 21, 22, (III. Rot. Parl. p. 418, *a. b.*); Higden's "Defence of the View of the English Constitution," pp. 88—9, (London, 1710, 3rd Edit.)

(f) 21 Ric. II. *n.* 32, (III. Rot. Parl. 354, *b.*)

Freedom of the King, and the Right of His Crown (g). In the same Parliament, the Duke of Gloucester, the Earls of Arundell and Warwick, and Others, although Charters of Pardon had previously been granted in their Favour, were impeached, tried, found guilty, and executed (h). Finally, all the Lords and Commons present in Parliaments were sworn, before the King, "to keep and hold, loyally and well, perpetually, the said Judgments, Establishments, Statutes, and Ordinances, made and rendered in the said Parliament, or at Coventry, or elsewhere, by Virtue and Authority of the same Parliament (i)."

Upon the Deposition of the King, which followed very soon afterwards, those violent Acts were made the Subject of just Animadversion; and Articles in Impeachment of the King were framed and presented in Parliament. The Fourth, Fifth, Sixth, and Seventh Articles, expressly charge Richard with procuring the Death of Gloucester and his Associates, in the Manner stated. By the Nineteenth Article, He is charged with procuring the undue Return of Members to Parliament, and with extorting, by Menaces and Bribes, their Assent to Measures, "which were prejudicial to the Realm, and most burdensome to the People; and, specially, to the granting unto the same King the Wool-Subsidy for His Life, and another Subsidy for Years certain; to the too great Oppression of His People (k)."

There was, therefore, no Hesitation, in the Minds of the Victorious Party, as to the Irregularity and Wickedness of those Proceedings. But neither was there any Question

(g) 21 Ric. II. n. 47 (III. Rot. Parl. p. 358, b.)

(h) 1 Hen. IV. *ubi supra*.

(i) 21 Ric. II. nn. 51, 89, (*Ib.* pp. 359, b, 373, a. b.)

(k) 1 Hen. IV. nn. 21—24, 36; (III. Rot. Parl. pp. 418, a. b. 420, a.)

that they were strictly formal. Subject to the general Maxim, that no Statute is valid to operate Injustice, the enactments made in that Parliament were as valid as any upon the Statute Roll. Of this the new King and His Parliament were quite sensible;—and, far from treating the last Parliament as a Nullity, and its Acts as being intrinsically of none Effect, they found themselves under the Necessity of re-enacting other Statutes, which had been passed by a former Parliament in the Interest of their Party, and which, as such, were repealed by that Parliament. Accordingly, upon Petition of the Commons, Henry IV. gave His Assent to Three Acts. By the First Act, “the said Parliament, holden in the said Twenty-first Year, and the Authority thereby given, as above is said, with all other Circumstances and Dependencies thereof, were adjudged to be wholly reversed, revoked, made vain, cancelled, repealed, and annulled for ever.” By the Second Act, “the Parliament, holden in the Eleventh Year of the said late King Richard, with all the Circumstances and Dependencies thereof, were to be in their Force and Virtue, and to be holden and kept, in all Points, according to the Form, Effect, and Purport thereof.” By the Third Act, Restitution of the Attainders and Forfeitures, incurred by Gloucester and his Party, was to some Extent enacted (1).

It has been ruled, in a modern Case at Nisi Prius, that, in an Action of Trespass against a Tax Gatherer, for distraining the Plaintiff's Goods, upon his Refusal to pay his Assessment to the Land Tax, it is not competent to the Plaintiff to show, that the County in which he dwelt, and his Lands were situate, was at the Time unlawfully deprived of its real Representative, by the wrongful Measure of

(1) 1 Hen. IV. *nn.* 66—8—70, 113; (III. Rot. Parl. pp. 425, a. b, 426, a, 436, b, 437, a.)

the same House of Commons which imposed the Tax (m). Substantially this is a Confirmation of the present Position. There can be no Doubt, to use the Words of Mr. Serjeant Glynn on that Occasion, that, to constitute the Legality of all Impositions of that Kind, it is necessary that they should have the Consent of all the Representatives of the People, or at least the Opportunity of procuring that. The Decision of Lord Mansfield, therefore, can only be upheld upon the Ground, that the Nominee of the Parliament, which granted the Supply, was,—actually and in Point of Form, though spuriously, and against Right,—the Representative of the Plaintiff, and of the Rest of the Freeholders of Middlesex. But that Decision did not make their Proceedings the less unrighteous and against Law. It amounted to no more than this, that, however unlawful in Substance, they were not erroneous in Form; and that certain apprehended Consequences did not result from the mere Illegality of such Proceedings. In Point of Fact, that is the Proposition here.

I know that it has been said, by some who do not appear to have noticed the earlier Passages in our Constitutional History, that the contrary Position has the express Authority of Precedents, of the Stuart Time, to support it. During the Period of the Commonwealth, First, the Parliament, and, afterwards, the Lords Protector, were invested with the supreme Legislative and Executive Authority for the Time being. Yet the Reign of Charles II. is always dated from the Day of His Father's Death, and not from the Restoration. All the Acts of Parliament passed in the Interval are treated as Nullities, which required no Statute to repeal them. The Men, who, acting under the Supreme

(m) *Per* Lord Mansfield, in *Townsend v. Hunt*; K. B. Sittings at Westminster, 7th June, 1772; (XV. Annual Register, App. to Chronicle, pp. 174—5.)

Authority, for the Time being, put Charles the First to Death, were tried and condemned; notwithstanding the Statute of the 11 Henry VII., of which they pleaded the Equity in their Justification. And not alone the Regicides;—but One who was not of them. Sir Henry Vane suffered along with them, because, like them, he had levied War against a dispossessed *de Jure* Sovereign, in Obedience to the combined Will of the *de Facto* Legislature and Government.

But the Cases are not parallel. There was no Question of a King *de Facto*, in the Case of the Regicides. “If a Man,” observed the Lord Chief Baron Bridgeman, upon the Trial of the Regicides (*n*), “serve the King in the War, he shall not be punished, let the Fact be what it will. Clearly the Intent and Meaning of the Act is against you. It was to preserve the King *de Facto*. He was owned, by these Men and you, as King; you charged Him as King; and He was sentenced as King. That, that King Henry VII. did, was to take Care of the King *de Facto*, against the King *de Jure*. You proceeded against your own King, and called Him in your Charge, CHARLES STUART, KING OF ENGLAND.” And, as to Sir Henry Vane,—who, though no Regicide, was guilty of levying War against Charles II. on the Day that His Royal Father lived and died, and afterwards,—it is apparent, as Hawkins has remarked, (*o*) that no other Person was ever in Possession of any Sovereign Authority, known to the English Law. At the Time of the Murder of Charles I. there was, *de Facto*, a House of Commons, from which however the Majority of its Members had been extruded by an armed Force. But the House of Lords had been abolished, together with the Monarchy; and, *de Facto*, therefore, there was no Parliament. Ultimately, Cromwell became possessed of the Protectorate. But he

(*n*) The King *v.* Cook, V. How. St. Tr. 1113—14.

(*o*) Book I. Chap. 17, Sect. 18.



never affected the Style of King. In Short, from the Murder of His Father, down to His own Restoration, the Son remained without One Competitor, to dispute with Him the Possession of His Crown.

As to the Union Acts themselves, there is nothing in them which should distinguish them, in any Respect, from other Statutes. Of One and all, it may be with Confidence affirmed, that, against the Prerogatives of the Sovereign and the Common Weal, Acts of Parliament are utterly powerless.

I resume my Narrative.

It cannot be doubted, that the Measures adopted by arbitrary Ministers of the Crown, for bringing old Local Jurisdictions into Ruin and Contempt, were, from an early Period, warmly supported by the House of Commons. Their Introduction into Parliament, as a permanent Estate, of co-ordinate Authority with the other Two Estates, was, of itself, highly calculated to destroy, by Degrees, all Distinctions of Tenure; just as the antient Law was, in an especial Manner, well calculated to maintain them. Then came the Separation of the Two Houses,—the One to consist of the Lords of Parliament, personally summoned by Special Writs,—the Other to consist of the Commons of Parliament, not personally summoned, but only by Writs, which were directed to the Sheriffs, Bailiffs, and other Officers of the several Counties and Places of the Realm, and by Virtue of which their Delegates were elected. This Distinction in the Characters, Appellations, and Rights, of the Two Houses, by Degrees, produced a similar Division in their Duties, or rather perverted their Sense of them. Emulation grew into Jealousy;—Jealousy, not merely of the Rival, but of every Hinderance to his Humiliation. The Power of the Commons in Parliament waxed strong; but not at First so strong as to overshadow the Lords of the Great Council, nor to satisfy Parliamentary Ambition. The

Commons of the Realm did not, all at Once, concentrate all their Affections and their Zeal upon the Persons, the Rights, or the Privileges, of the Commons assembled in Parliament. There were other antient Courts—far dearer each to its own Suits, than that High Court of the Realm. There were other Commons besides those which met in the Parliament,—other Delegates besides those who were sent thither,—and each Man loved,—if not these the less,—then those the more. The Exaltation of the House of Commons to its present untoward Eminence,—it needed the willing Sacrifice, or else the violent Destruction, of all these local Sympathies to effect.

At this Day, all the Business of the State, and of every City, and County, and Parish, and Village belonging to it, is reduced into a mere Matter of Legislation, to be determined in Parliament; and so it comes into Effect, under Sanction of a Parliamentary Privilege, or an Enactment. If any Thing goes wrong in any of our Functions, it must wait till Parliament meets. No Matter that it be not within the Competence of Parliament to take the Initiative in amending it, or to take any Part in it at all. No One ever thinks of its being set right by the Executive, without the simultaneous Concurrence of the Legislature. Whether the Reform be Legislative only, or Administrative only, it matters not. It must wait till the Meeting of Parliament.

But when Parliament is met, and the Exigency is propounded, the Question which has to be decided is not, whether a new Law is wanted at all for the Reform of the Mischief? but only—What Kind of new Law it shall be? Amongst our modern English Members, there are few indeed that venture to oppose this Mania of Legislation. The Difficulty is only as to the Sort. It is beneath them to content themselves with the old Laws of the Land, however adequate to the Case before them; even could they be satisfied that the old Laws did exist. In the Time of Edgar

the Glorious, it was said, "Let no Man seek to the King, unless he cannot find Right at Home. But, if that Right be too heavy for him, then let him seek to the King to have it lightened (*p*).” But now, as Mr. Windham once wittily expressed it (*q*), "The Courts below keep up their Price. Parliament only is cheap. The Legislature is as accessible as the Parish Pump. It may be worked by the First man who puts his Hand to it." In this untoward Accessibility, the History of whole Centuries of Decline lies revealed to View;—with the Omen of future Continuance. *Corruptissimâ Republicâ, plurimæ Leges.*

The Progress of Decline in the History of States is rarely to be traced but by Intervals. It is so difficult to pronounce, when the good Custom began to fall into Desuetude, and when the evil Custom First came into Use. The Habits of Ages are not instantly, nor all at Once, forgotten or laid aside.

In the Sixth Year of the Reign of Edward III., we meet with an Entry upon the Roll of Parliament, which clearly shows that, at that Time, the antient Methods of Taxation still continued to subsist. The King had caused Commissions to issue, into every County of England, excepting the Counties Palatine, for the Levy of the Tallage, upon Cities, Boroughs, and Lands, of His Demesne. The Tallage was to be assessed according to the Means of the Tenants. Of their Moveables, the Fourteenth,—of their Rents, the Ninth,—were to be taken. To determine the Proportions, as well as the Means, of the Tenants, the Sheriffs were commanded to cause to come, before the Commissioners, all those of their respective Visages whom they should deem necessary. At a Parliament, holden shortly afterwards, the King granted, that the Tallage,—lawful as it undoubtedly was in this In-

(*p*) Antient Saxon Laws; Edgar.

(*q*) Debate on the Monastic Institutions Bill, 23rd June, 1800; XLII. Annual Register, p. 142.

stance,—should not be levied, under the Commissions in Question ; and, generally, He promised, in the Names of Himself and His Successors, that no Tallage should ever be levied, save what was reasonable, and had been accustomed. Then the Prelates, by Themselves, the Earls, Barons, and other Great Men, by Themselves,—and the Knights of Shires, by Themselves, (for there were no Citizens nor Burgesses present,) granted, in Their Turn, that, instead of the said proposed Levy, the King should have the Tenth Penny in all the Cities, Boroughs, and Lands of His Demesne, and likewise the Fifteenth Penny in Their own Commonalties ; a Grant quite as profitable to the King, and more easy to the People. The Levy was to be made in the usual Manner. There were to be summoned, before the Taxors, as many as they should see fit, of the Chief Men of each City, Borough, and other Town of the County, within Franchise and without. From among these, other Taxors were to be chosen, who should be sworn, and state, what every Resident of those Localities had, at the preceding Michaelmas :—and thereon the Tax was to be levied (*r*). In all these Transactions, there is nothing that is new to the Reader, familiar with former Constitutional Lore ;—not even the Concession, or Covenant, which the King made against unreasonable and unprecedented Tallages ; for such, even in Respect of His own Demesnes, was, as has been shown, ever the Law or Custom of the Realm.

The Grant in the last Case was a separate One ; and therefore partial only. The same old Method reappears at Intervals, long subsequently. Thus, the Clergy of York and Canterbury,—in their several Convocations,—granted to the same King, each a Biennial Tenth ;—and the Knights, Citizens, and Burgesses, of the Realm, assembled in Parliament, granted Him, upon certain Conditions, Two Fif-

(*r*) II. Rot. Parl. 6 Edw. III. p. 66, and App. pp. 446—7.

teenths and Two Tenths ;—albeit the Lords of Parliament made no Grant of Money ; being bounden, by their own Consent, to adventure their Persons in France (*s*). Two Years afterwards, the Lords, without the Commons, made a separate Grant of Array for themselves, and the King endeavoured to bind the Commons by that Grant, which, however, they successfully resisted. In the same Parliament it appeared, that the Lords, acting in Conjunction with the Merchants of the Ports, but without the Concurrence of the Commons, had also granted a Subsidy, to be raised by a Tax upon the Export of Wool, belonging to the latter (*t*). These Measures were accordingly enforced ; and, doubtless, they were perfectly legal.

In the Fourth Year of Richard the Second, the Commons endeavoured,—by making their Grant to be contingent on the Third Part of it being levied from the Clergy,—to bind the latter without their Consent. But the Clergy answered, that “ their Grant was never made in Parliament ; nor ought so to be ; and that the Laity ought not to bind the Clergy ; neither could they ; and that the Clergy ought not to bind the Laity ; neither could they ; but that it seemed unto them, that, if any ought to be free, it should rather be the Clergy than the Laity.” Howbeit, they undertook to do, “ what they ought to do, on their Part.” The Commons were obliged to submit (*u*).

The Commons were equally unsuccessful, in similar Attempts against the Rights and Franchises of Places, which, though forming Part of Shires which returned Members of Parliament, nevertheless sent no Members thither. The Gavelkind Lands of Kent were thus exempt by their Tenure. The Commons endeavoured, with the King’s Aid,

(*s*) II. Rot. Parl. 18 Edw. III. p. 146.

(*t*) *Ib.* 20 Edw. III., p. 160.

(*u*) III. Rot. Parl. 4 Ric. II. p. 90.

to destroy the Exemption ; and they repeatedly petitioned Richard to assent to Legislative Enactments, making these chargeable, or Guildable, with the Rest of the Shire ; “ having Regard that several Parliaments were then ordained to be holden, which were not formerly.” But the King would not assent to the Change ; and the invariable Answer returned to such Petitions was, “ Let it be done as hath hitherto been accustomed ” (x). Nor did they succeed better with the Counties Palatine of Durham and Chester, and other like Places within the Kingdom, not previously Guildable. These they endeavoured to reduce within the Jurisdiction of Parliament. But, excepting as to the Cinque Ports, which had recently begun to send Representatives to Parliament, the King courteously declined their Prayer, making Answer, that, as to such Places, “ He would do what He could ; saving their Franchise ” (y).

The King’s Answer might, for a Time, have discouraged their Endeavours,—for even then, as is well remarked by the Noble and Learned Committee so often cited, they were engaged in such,—“ to make the Representation, in Parliament, a Representation of all the People of England ” (s).

They retaliated, nevertheless, a few Years afterwards ; when they made Complaint, in Parliament, of the Exactions laid by the Pope upon the Clergy,—with their own Consent in Convocation. Of these, upon Pretence of Burthen and

(x) III. Rot. Parl. 1 Ric. II. p. 25 ; 2 Ric. II. pp. 44, 53 ; and again in IV. Rot. Parl. 2 Hen. V. p. 49 ; and 3 Hen. V. p. 76.

(y) III. Rot. Parl. 4 Ric. II. p. 94. The County Palatine of Lancaster was peculiarly situated. It had been created, by Edward the Third, in Favour of John of Gaunt, (Rot. Pat. 25 Edw. III. p. 1, m. 18), but it did not lose the Franchises, which it had enjoyed whilst a Shire. It continued therefore to send Members to Parliament by the same Title of Usage, which exempted the Two other Palatinates (Lords’ First Report, p. 343).

(s) Lords’ First Report, p. 339.

Damage, they obtained the Prohibition, in that Parliament, by Means of the King's Writs. Into the same Writs, they managed to introduce the much sought-for Declaration, that, by the Rights and Customs of the Kingdom, any Impositions on the People, without *the Common Council and Assent of the said Kingdom*, ought not to be levied in any Manner (a).

In the Twenty-First Year of the same Reign, they sealed their Triumph over the stubborn Franchises of Ecclesiastics. At their Prayer, the Spiritual Lords were severally examined by the King;—for the Forms of Independance were still observed at the Making of every Sacrifice. It was then proclaimed, that these had consented to commit their full Power to some Layman, who should consent, in their Name, to all Things and Ordinances, in that Parliament. Yet the old Feelings of Right were still so far stronger than the new Doctrine, that, although the Powers of the Clergy were thus concentrated in the Person of a Lay Member of Parliament, he was not ranked with those of the other Estates. His Vote was taken apart; and,—like the Lords Spiritual and Temporal, who sate in that Parliament,—“the Procurator of the Clergy” is specially recorded to have been “severally examined,” touching his Assent to the Bills, there presented by the Commons (b).

But, although the Commons showed themselves thus jealous of all those isolated Jurisdictions, which resisted Concentration, they were by no Means minded to reunite their own Authority with that of the Upper House of Parliament. The normal Separation of the Houses, in the Reign of Richard the Second, is a Fact well ascertained. That Traces of the same are to be met with under Edward the Third, and even earlier, is certain. For, in that Reign the Distinction, between Great Council, and Great Council of Parlia-

(a) III. Rot. Parl. 13 Ric. II. pp. 206, 405.

(b) *Ib.* 21 Ric. II. pp. 348, 357.

ment, had already obtained in Speech ;—the former being applied to the Lords Temporal and Spiritual, when assembled without the Commons ;—whereas the Commons were never considered, nor treated with, as a Council, save only when they formed Part of the High Court or Great Council of Parliament. Still, the Period, when the Separation became constitutional and permanent, it is difficult to determine. Perhaps the First authentic Records, bearing express Witness to the Fact, are the Judicial Proceedings of the Lords against Richard after His Deposition. In those Proceedings the Commons took no Part ; whilst, on the Contrary, they expressly disclaimed and renounced, very shortly afterwards, all Right whatsoever to take any Part in the Judgments generally of Parliament (c). Nevertheless, in the Fourteenth Year of Edward the Third, the Commons had, by Assent of the Lords, certainly taken Part in the semi-judicial Business of the Triers of Petitions ;—for, to that Court of Peers, they Once returned a Duodenary Number of Knights, and Half that Number of Burgesses, to be their Delegates (d).

In opening the next Parliament, the Commons were commanded, by their new King, to proceed, at Once, to the Election of their Speaker, “Come le Manere est” ;—and it was done (e). The Lords are not mentioned.

Some Years afterwards a Collision ensued, between the Two Houses, upon a Matter of Supply ; and a Duodenary Committee of the Commons maintained the pretended Right of the Lower House to that exclusive Deliberation upon such Matters, which, at that Time an Usurpation, has since grown into a Privilege. The Lancastrian King acquiesced in their Pretensions ; and the Lower House was permitted to lay Claim to the sole Right of originating Money Bills ; and

(c) III. Rot. Parl. 1 Hen. IV. p. 424.

(d) II. Rot. Parl. 14 Edw. III. p. 112.

(e) III. Rot. Parl. 1 Hen. IV. p. 454.



that no Bills should go up to the King, until the Two Houses should be of one Mind concerning them. It was however provided, that the King, and the Estates of Parliament, should still be as free as They respectively were theretofore (*f*).

But, although this Concurrence of the Houses was acknowledged to be necessary in order to bind the Realm, it was not intended to take away, from either House, their undoubted Right, to make partial Grants, whether of Men or of Money, such as should bind themselves, and even their Constituents, or Followers. It is in this Sense, that the Dictum of the Judges, in Edward the Fourth's Reign, is to be understood, which declares (*g*), that a Subsidy may be good enough, although granted by the Commons, without Assent of the Lords of Parliament. It would be difficult to contend that, in the Sense here stated, this Dictum is not in a great Measure Law, even at this Time.

In like Manner, the Parliament continued to remember that the Law gave them no higher Authority than what the Terms of their Delegation conferred. Even so late as the Reign of Henry the Fourth, we meet with the "Presentment," which the Commons,—Grand Inquest of the Nation—made by "Unanimity" of Voices, touching the Succession to the Crown. But the Knights, Citizens, and Burgesses, who concurred in the Presentment, though elected and returned only by their respective Communes, affected to consider themselves the Procurators and Attornies for the whole People of the Kingdom. They are so styled in the Statute, which, upon their Presentment was made, being intended as a Legislative Enactment of what thenceforward should be the Constitution of the Legislature of this Realm (*h*). The old Legislative Consti-

(*f*) III. Rot. Parl. 9 Hen. IV. pp. 610—11.

(*g*) Year Book. 21 Edw. IV. p. 48 (Maynard's Edition).

(*h*) III. Rot. Parl. 8 Hen. IV. pp. 374—5.

tation was already lost when such Doctrines were enacted. Yet, not long previously, the same House of Commons had frequently declared it unsafe for them to act, in the Absence of sandy Lords and Commoners of Parliament, and that they dared not consent, without consulting, and advising with the Commons of their several Communities; and therefore they solicited and obtained such Respite of the Matters in Deliberation, as would give them Leisure to advise with such their Fellow-Members and Constituents, touching the Grant of the Aid, or the Making of the Statute (i).

But, in the Progress of Doctrine, even these Terms vanished. The Parliaments of Henry VI. not only demanded no special Powers from their several Communities, but, on the contrary, curtailed and remodelled the Number of their Constituents, at their own good Pleasure. And, having done so, they next claimed the inherent and indefeasible Right to bind, as well their own Constituents, as those whom they had before deprived of their own local Liberties, and now of the Right of Suffrage at Elections for Parliament (j).

It was probably upon the same Principle, that, in 1717, the House of Commons, on the very Eve of their natural Dissolution, by the Effusion of the Three Years for which alone they had been elected, passed a Septennial Act, and declared themselves within its Provisions, and thus continued, for Four Years longer, without Re-election, their corporate Existence. The avowed Reason for that manifestly illegal Measure was, lest, in the Jacobite Ferment of that Time, the next General Election might result in a Jacobite Parliament, and the Loss of a Whig Majority.

Contemporaneous and commensurate with the Decline of

(i) II. Rot. Parl. 6 Ed. III. p. 67; 13 Ed. III. p. 103; 20 Ed. III. p. 160; 27 Ed. III. p. 253.

(j) Stat. of the Realm, 8 Hen. VI. c. 7; 10 Hen. VI. c. 2.

the old local Jurisdictions, must have been that of their Fiscal System. But here the same Difficulty meets us,—when we endeavour to assign an Epoch to each Change,—as in tracing those Changes which eventually absorbed the King's Courts, of the Shire, Hundred, and Vill, in the King's High Court of Parliament. We cannot fix the Time, although we know that the Event happened. We know it, as we know what is passing around us ; as we know what has been passing for the last Four Hundred Years ; merely by the Results. But the Diary of the Decline we know not. Only here and there Something is saved for History.

It is recorded, how that a certain erroneous Parliamentary Computation, of the Number of Parishes in England, Once brought Edward the Third into a temporary Embarrassment ; which made it necessary for Him to consult with His Council, touching the Measures to be taken for procuring a new Distribution and Assessment of the Grant of a former Parliament ; so as to enable Him to raise the whole Sum of 50,000*l.* there granted. On examining the Particulars of the Error, it appears that the Parliament, not limiting itself to make the Grant, had proceeded to make the Assessment, according to which the Money was to be levied ; and that, too, not upon the Townships, or Vills, but upon the Parishes, at 22*s.* 3*d.* for every Parish (*k*).

This curious Illustration of the Progress of centralising Doctrines, and, be it also observed, of the official Embarrassments, which Centralisation always brings in its Train, derives further Light, from the subsequent Enactment of 9 Hen. IV. c. 7, framed upon the Petition of the Commons.

In the Reigns of former Monarchs, as we have seen, no general Rule or Method of Assessment was, or could be, adopted. It was left to the Taxors, or “*Elisors*,” of each Shire,—to make the Assessment, upon the Hundreds and

(*k*) II. Rot. Parl. 25 Ed. III. p. 303.

Townships, of which the Shire was composed,—and to the Taxors, or Elisors, of those inferior Localities, to ascertain the Individuals, among whom the Burden ought to be shared, and the Proportion of each Man's Liability. This might easily be done by Means of local Assessors, whilst it never could be done by the direct Agency of Parliament or of the Exchequer. Uniformity is the utmost Result, that the best regulated System of Central Administration can ever hope to accomplish ; to bring all Things, namely, to one dull Level, over which Nothing must pass !

In the present Instance, it was assumed that, upon all Towns, within the Meaning of the Statute, a Sum, always certain, was chargeable ; in Respect of every Tenth, Fourteenth, Fifteenth, or other Subsidy, granted by Parliament. It was then enacted, that the Liability of Goods to answer for the Owner's Contribution towards that Sum certain, should be determined, not by the Domicile of the Owner, nor by the Place, where the Goods were usually deposited, nor where they were at the Date of the Levy ; but by the Place where they happened to be lying on the Day when the Grant was made in Parliament. No Discretion was by this Statute allowed to the Taxors, to qualify in any Case the Letter of the Statute ; nor was any Provision made for the Possibility of Hardship.

More absurd, and far more iniquitous, was the celebrated Poll Tax ; which the Commons, in the Fourth Year of Richard the Second,—foiled in their Attempts upon Church Property,—granted to the King. The Tax was to be levied on all Lay People, Male and Female, of the Age of Fifteen Years;—"very Beggars only excepted" (*l*). But, if the Assessment was thus uniform, the Resistance to it was equally so. The Insurrection of Wat Tyler has made it for ever famous in History.

From the Beginning of the Reign of Edward the Third,

(*l*) III. Rot. Parl. 4 Ric. II. p. 90.

Wretchedness and Famine, with their attendant Discontent, had already become too familiar to the Peoples. In the King's own Presence, the Distress of the Country was more than Once the Subject of distasteful Speech in Parliament. Pestilence, Scarcity of Money, Dearth of Corn, Decline of Husbandry, Turbulence, Riot, and Plunder,—these were the frightful Warnings, which testified to Edward and the Commons, of the Usurpation of Authority, and the Growth of Centralisation. It is now the Nineteenth Century; and Warnings, more terrible still, are still disregarded.

Risings of the Populace in former Times had been scarcely known. They were henceforward to furnish the chief Matter of England's domestic History. The lowest Class has ever been the last to be perverted. The People's own Institutions are not taken away without a Struggle; and the Traditions of such, after they have utterly died out amongst the Successors of those who usurped them, continue to survive amongst the Populace. Owen Glyndwr had no hereditary Claims to the Obedience of the Welshry;—but he came amongst them the Reformer of Abuses, and the Restorer of a violated Constitution, and he was heard. The Assembly which he summoned to Harlech, for Redress of Grievances,—and which, in contemporary Records, is, in the Language of the Day, styled “Parliament,”—was constituted of Four of the most Sufficient Men from every Commote under his Obedience (*m*). The Yeomen of the North, headed by Sir Robert Aske, rose up, as One Man, against the Maladministration of Henry the Eighth, against the Usurpation of local Franchises, and against the Dishonour which a Council, studiously composed of the Base, Vile, and Ignoble, had brought upon the Realm. Force failed to put them down. The King treated with them, listened to their Demands, and granted

(*m*) Ellis's Letters, Second Series, Vol. I. p. 43.

them. But, when they had disbanded, and gone Home, the perjured King annulled the Treaty, and seized the contracting Parties, and put them to Death (a). The Commons of East Anglia renewed the Contest, in the Reign of Edward the Sixth, headed by one of a more plebeian Character. Kett, the Tanner, was their Leader, Lawgiver, and Judge. His Moots were assembled beneath the famous Oak of Monsehold Heath, where many a Moot had been held in Days of Yore ; and Men called it the Oak of Reformation. There he administered Justice, held his Courts, and enacted his Laws, with the Help and Advice of Two Deputies from every Hundred ; after the Manner, as Palgrave has remarked, of the more celebrated Convention of Malecontent Norman Peasantry, in a former Age (o). But that Insurrection had no happier Issue than had the "Pilgrimage of Grace ;" and Warwick's Troopers slaughtered the Insurgents, and hanged the Bodies of their Ringleaders, upon the very Oak, beneath which they were wont to assemble. Those ill-fated Men, after all, had a true Perception of their Grievances ; and, if the Remedy they sought was violent and doubtful, it was, beyond all Comparison, sounder and better than any which modern Demagogues would have devised. The Traditions of England were at that Time still current amongst the Populace. But now they have perished utterly ;—and, in their Regard, neither the Chartist nor the Socialist stands upon any higher Level, than does the Radical, the Repealer, the Tory, or the Whig.

Lord Coke informs us, that, in his Time, the Fiscal System of other Days, although much debased undoubtedly, was still in Use. The Memory of what it had been subsisted still, to point to what it ought to be, and to warn

(a) Collier, Vol. II. pp. 242, et seq. ; Lord Herbert, p. 246.

(o) I. Rise and Progress, p. 635.

the World of the Corruption that was then in Progress. "Since this Time," he says, speaking of Magna Carta (p), "the Manner of the Fifteenth is altered. For, now, the Fifteenth, which is also called the Task, is not originally set upon the Poll, as at this Time it was. But, now, the Fifteenth is certainly rated upon every Town. And this was by Virtue of the King's Commissions into every County of England. In 8 Edw. III. (q), Taxations were made of all the Cities, Boroughs, and Towns in England, and recorded in the Exchequer; and that Rate was, at that Time, the Fifteenth Part of the Value of every Town; and, therefore, retaineth the Name of the Fifteenth still. And, after the Fifteenth is granted by Parliament, then the Inhabitants rate themselves for Payment thereof. And, if One Town be joined with another, in the Rate of the Total, and subdivided on each a certain Rate in that Commission, and the One is rated too low, and the Other too high, there lieth a Writ, called *ad æqualiter taxandum*, to be taken out of the Exchequer, to rate the Towns equally."

A more important Fact is better ascertained, with Respect to the Period of the Decline of the wise old Fiscal System of our Ancestors. We know that it began at the same Time with the Usurpation of the Functions of the antient Fiscal Jurisdiction of the local Courts, by the High Court of Parliament; and that the Growth of the Decline followed closely upon that of the Usurpation, as ever Effect follows after Cause. There is further and indisputable Authority to show, that, as the commencement of the Decline was the Fruit of the inordinate Ambition of Parliament, so it was not until the Period when Parliamentary Influence triumphed over Law, that the Consummation of the Decline was reached.

(p) 2 Inst. p. 77.

(q) Rot. Pat. 6 Ed. III. 2 Part. m, 26.

The Traditions were still extant,—the Institutions were yet in Vigour,—when Holborne, the learned Counsel, who argued the Case of Ship Money upon Hampden's behalf, before King Charles's Judges, could urge against the Method of the Tax such Objections as the following. Certainly they would not be understood in these Days, when all the Functions necessary to the Levy of almost all the Rates and Taxes in Existence are concentrated in a Staff of Officers in Somerset House.

“It is hard to find where there is a Writ that commands, and prescribes, the Manner of Levy. In all Cases of politic Charges, the Law takes an especial Care to make an Equality. How a Sheriff hath that Knowledge, to lay it on Men's Estates and Lands, I cannot tell. Though the Law may trust the King, yet it is a Question whether it will trust the Sheriff! Assessments are usually made by Others, and not so much by the Sheriff. So that, if the Law doth trust the King, yet, whether or no this be the Way to charge it, I leave it to your Lordships' Judgments. If a Hundred be charged, they have Ways to lay it on themselves proportionably” (r).

At this Period, then, the Traditions of the olden Time were not yet obscured by the Growth of Parliamentary Doctrine. Even in the corrupter Days of Charles I., the People and their Advocates saw and felt that Self-Government and local Taxation were great and constitutional Necessities ;—and that in the King's Courts of the Hundred and the Vill, and not in His Court of Parliament, nor elsewhere, were those Necessities to be supplied. The Attempt to levy Ship Money, under Writ directed to the Sheriff, was, therefore, a Grievance. In a few Years afterwards, the Parliament, under Profession of a general Wish to redress all Grievances, made war upon the Monarchy. The Monarchy

(r) The Case of Ship-Money. III. How. State Tr. p. 1014.



went down. The Parliament triumphed. From that Time, so far from the Independence of Parliament being endangered, neither the Protectorate established by Cromwell, nor the Restoration which brought back the Stuart Dynasty, nor any Event that has since happened, has been potent to check the disordered and unwieldy Increase of Parliamentary Encroachment. It was, therefore, not for Lack of the Power to maintain the antient Fiscal System, and the Machinery by which it was conducted, that, during the Parliamentary Era of English History, the former of the Two was abolished, and the latter forced into Inaction.

The Usurpation was complete and rapid. From the Revolution of 1688 to the present Time, scarce a Vestige of those old Traditions appears upon the Statute Book ;—with the Exception of the annual Land Tax Assessment, perhaps not One. I shall briefly refer to it, but solely on that Account ; for it is otherwise a Matter of very little Importance.

By the 1 Will. & M. c. 20, the 1 Will. & M. Sess. 2. c. 1. and the 4 Will. & M. c. 1, Aids were granted, by a Tax upon Lands, Pensions, Offices, and personal Property in England ; and new Assessments were to be taken of every Man's Property and Income, for the Purposes of those Acts. Every City, Borough, and Shire, was allowed to assess itself, and,—the old Machinery being now entirely disused,—almost without any Check. Accordingly, the Rate was far from being equal throughout the Kingdom. The heaviest Imposts were, of Course, laid upon the Adherents of the abdicated King ; and, probably, the Men of the Revolution were comparatively not charged at all. It is said that the Inequality, and consequent Unproductiveness, of this Tax, continued down to 1798 ; when Mr. Pitt introduced his new System of Assessment, and made the Land Tax perpetual (s).

(s) Wells on the Revenue and Expenditure, pp. 175—6.

From the Foundation of this Commonwealth, the Feudal Tenures had been its chief Defence. They flourished under the Octarchy. They survived the Conquest. They perished in 1660;—by a Bargain between the Second Charles and his corrupt Parliament. But England rued bitterly the unrighteous Bargain.

The Tax, which we term Excise, was of Dutch Invention. It was always an hateful One to the English People. Long before its Introduction into this Country, a vague Pre-sentiment of the Evil appears to have taken Possession of the public Mind. The Fiscal Proceedings of their Dutch Rivals began to be watched with much Jealousy, as betokening an alarming Precedent for themselves. “So as,” says a contemporary Writer (*t*), “in a Parliament in the Reign of King James, some of the House of Commons,—having been informed that the King had employed a Gentleman into Holland, to inquire concerning the Manner and Manage of their Excise,—(which, as afterwards appeared upon Examination, was but for Curiosity and Learning’ Sake),—were so troubled at it, as the Gentleman hardly escaped a Vote—whether he should not be most severely punished.” Yet even James the First never dreamed of substituting a Revenue, obtained by the Excise or any other Tax, perhaps, in the Place of the Military Tenures. “He was heard to tell his Son, That such a Yearly Revenue as was offered in Lieu of those Tenures might make him a Rich Prince, but never a Great” (*u*). If that were so, the Son never forgot the Lesson.

Towards the End of His troublous Reign, the Long Parliament forced an obnoxious Puritan Lord, the Earl of Bedford, upon the unwilling Charles; so that the King was obliged to accept him for His Lord Treasurer. That Earl is said, by Clarendon, to have had it in his Contemplation,

(*t*) Phillipps’s “*Tenenda non Tollenda*,” p. 233, Sect. lxi.

(*u*) *IB.* p. 147.

to set up the Excise in England. But, if that were so, the Odium of the Project prevented it from coming to pass. Later still, in 1642, when the Long Parliament was actually meditating such a Measure, the House saw itself obliged to screen its Purpose, by voting a Resolution to the Effect, that, for as much as "Aspersions were cast by malignant Persons, upon the House of Commons, that it intended to introduce Excises, the House, for its Vindication therein, did declare that those Rumours were false and scandalous, and that their Authors should be apprehended, and brought to condign Punishment." And, in 1643, says Clarendon, an Attempt to impose the Excise was successfully resisted by the House of Lords (x). But this was the last Triumph of the Constitution. In 1644, we find the same Parliament imposing an Excise on Malt Liquors, Cider, and Perry, upon Pretence for carrying on the Civil War; and also upon the express Condition, that it should be continued no longer than to the End of that War, and be then laid down, and utterly abolished.

The Exasperation caused by the Measure amongst the People, and even amongst the Soldiery, whose Pay was the Pretence put forward in its Justification, was so great, that a Second Rebellion,—of the People against the Demagogue,—had almost been the Consequence. "Whoever would have thought," writes One in 1644 (y), "that the Excise would have taken Footing here? a Word—I remember—in the last Parliament, save One, so odious, that, when Sir Dudley Carleton, then Secretary of State, did but name it in the House of Commons, he was like to have been sent to the Tower. He was suddenly interrupted, and called to the Bar. And, yet, he named it in no ill

(x) Clarendon's History, Vol. IV. pp. 52, 418.

(y) Howell's Letter of August, 1644; and *vide* Mr. Urquhart's "Wealth and Want, or Pauperism and its Cure;" p. 56, (London, 1845.)

Sense ; but to show what Advantage and Happiness the People of England had over other Nations ; having neither the Gabels of Italy, the Tailles of France, nor the Excise of Holland."

Shortly afterwards, we find the Parliament, at the Instance of Prynne, the Father of this hateful Tax, extending it to so many other Articles, as to make it almost a general Excise. In One of his Letters to Sir John Hotham,—of Traitor Notoriety,—he states, that "they had proceeded in the Excise to many Particulars, and intended to go on further ; but it would be necessary to use the People to it, by little and little (*z*). But much was necessary to be done, before that could be accomplished. The Discontent was general ;—and it, more than Once, resulted in open Insurrection against the usurped Authority of Parliament ; no longer popular since the Imposition of the Tax.

"We have every Week," write the Parliament's Committee at Chester to their Fellows in London (*a*), "new Occasion to write to you concerning it. We have had several Mutinies, which are not yet punished, nor absolutely appeased. The *Soldiery* take great Dislike at the Excise. The City and County almost generally distaste it. The Gentlemen that are employed have carried themselves very well in it, and endeavour, by all fair Means, to effect the same. But our Fear is, that they will not perfect the Business ;—*but some Constraint must be used* ; otherwise little will be made of it. *To prevent present Evil, we have told the Soldiers, that they are to be paid forth of it* ; and, if that take not, there is no Way left to satisfy them. We do assure you, if the Parliament resolve not upon some speedy Way, to send Money for disbanding of them, this County is in a

(*z*) *Apud* Wells on the Revenue and Expenditure, pp. 121—2.

(*a*) "The Committee at Chester to Colonel Booth and others ;" Letter of the 1st of August, 1646, in Cary's "Memorials of the Great Civil War in England ;" Vol. I. pp. 135—7 (London, 1842).

sadder Condition, in its own Particular, than it was when the Enemy" [the King] "prevailed. We must earnestly entreat you, to use your Endeavour for an Order to that Purpose. The Markets have been extreme small, upon the Rumour of the Excise. *The People say, they shall have a Second Siege.* The Gentlemen that are employed, must not be pressed to use any Extremity, *until such Time as there be a Civil Magistrate of the City, and the Soldiers either satisfied or appeased.* We extremely fear, if the Soldiery join not in the Tumult, yet all, or most of them, will stand apart, and will not assist their Officers. And what greater Evil may come thereof, more than the Damage in the Excise in this City, *which hath cost much Blood*, we know not, but leave to your more serious Consideration; and shall earnestly desire you, to go to the Chief Commissioners of Excise, and acquaint them with these Things; and desire them, not to press the Sub-Commissioners here to do any Thing, till City and County be in a better Condition."

The Alarm, which these Proceedings created, may have disposed the Parliament to follow the prudential Measures pointed out. But the Benefit, if any, was of a temporary Kind; and, in the following Year, the Disturbances again broke out, with even greater Violence. The new Committee, sent down by the Parliament, and the Deputy-Lieutenants of Chester,—amongst whom the Names of the Members of the former Committee appear,—represented their own Condition, and that of the County and City, in the most melancholy Light. "The Soldiers," said the former (b), "both Horse and Foot, being Four Months unpaid, have taken upon them the Boldness and Impudence to seize and enthrall our Persons, and to draw and enforce us to Chester, like Rogues and Thieves, in base and disgraceful Manner;—

(b) "The Deputy-Lieutenants at Chester to the Speaker;" Letter of 3rd July, 1647; in Cary's "Memorials," &c.; Vol. I. pp. 277—80.

sometimes throwing us all, being in Number Fifteen Persons, into One little Room, Part of the Common Gaol, where there was neither Bread, nor Provision of Meat or Drink, nor any Accommodation for Nature, but publicly, like Beasts, amongst ourselves; and to redeem our Persons, and save our Lives, we have been enforced to take upon us the Payment of Four Thousand Pounds;" besides incurring Liabilities to the Extent of One Thousand more. The Committee, after corroborating these Details in their Letter to Lenthall (c), also state, that the same Indignities were put upon "Colonel Massey, the Governor of the City, and a Captain, with some of the Committee, and Sequestrators, and Commissioners of Excise;" and "we know not," they add, "how far this Evil may proceed, nor how deeply the poor County may suffer."

Moved by these Representations, as they must have been, the Parliament were not the less resolved upon maintaining their Measures. The Constraint, invoked by the Committee, was used. Oliver's Saddle, to borrow a Phrase from Fabian Philipps, was put the more firmly on the unwilling Backs of the Communities of England. In a short Time, the enforced Subjection of the Tax-Payers to the Tax, had become so well established, that the Promoters felt themselves in a Condition to declare the Tax itself permanent; and the Condition, which had been the convenient Pretext for its First Introduction, null and void. It was boldly and openly proclaimed to be, "the most easy and indifferent Levy that could be laid upon the People;" and, as such, it was continued throughout the Period of the Commonwealth, and down to the Restoration of Charles the Second (d).

(c) "The Committee at Chester to the Speaker;" Letter of the 3rd of July, 1647; in Cary's "Memorials," pp. 281—2.

(d) Wells on the Revenue, &c. pp. 121—2.

Under its new Name of "Hereditary Excise,"—and so thenceforward, to become perpetual,—*that* was "the full and ample Recompence,"—received by Charles the Second, from His First Parliament, for helping them to confiscate the antient Franchises of His Kingdom. It was too infamous a Plot to escape altogether the indignant Censures of the few Patriots of the Time. There was One, in especial, who boldly and eloquently denounced it. His prophetic Warnings, unheeded then, have a fearful Significance for England of the present Day. It is impossible to indicate more clearly than these foretold, the Mischiefs which have accrued to Her, from the Loss of that "Seminary of Honour, and standing, noble, and more obliged Militia;"—for so this Writer most truly and eloquently characterises Her Chivalry and Yeomanry of old.

Gold and Silver, he said (e), and precious Stones,—or any Thing less than the whole Kingdom of England Itself,—was not of Value, or to be compared to the Honour of a King, and the Homage and Duty of his Subjects, the Gratitude, Faith, and Promises of their Ancestors, which should descend to them with the Lands. It was not the Weight of an inestimable Diamond, or Ruby, that made either of them to be better than a Flint, or any other Stone; but the Lustre, Virtue, and Scarceness of them. The Rate, which was now offered for those Tenures, was but like a Tender, or Offer, to give the Weight, in Gold, for an incomparable, not to be got again, and invaluable Medal; or for Aaron's Breastplate, Moses' Rod, or the Sceptres of Princes;—if they could have been purchased at all, and by Weight.

The Recompence of 100,000*l.* per Annum,—if it could be raised without Injustice, or the Breach of the Laws of

(e) Fabian Philipps's "Tenenda non Tollenda," (London, 1660,) pp. 225—8, 229—231, 233, 236, 244, 268. (See also Mr. Amos's Note to Fortescue de Laudibus; p. 166.)

God, Nature, and Nations, and our oftentimes confirmed Magna Carta,—and the Enforcing of Nineteen in every Twenty to bear Burdens, which nothing at all appertained to them, would not be adequate to the Loss of a great Part of the King's Revenue ; which did serve for the Maintenance of His Crown and Dignity, and to exempt and ease the Subjects of Extraordinary Taxes and Assessments ; which the Necessity of Princes, for the Good and Defence of the Kingdom, must otherwise bring upon them.

Again ; the giving the King a Recompence, by One yearly Rate, to be charged upon all Mens' Lands, Tenements, and Hereditaments, would be against Right, Reason, Justice, and Equity ; as well as unwarranted, by any thitherto Law or Custom of England, to make Nineteen Parts of Twenty, that were not liable to Wardships, or any imagined Inconveniences which might happen thereby, not only to bear their proportionate Part of the General Assessments for War, but a Share also in the Burden of Others, where it could never be laid upon them ;—only to free the Nobility, Gentry, and Men of greatest Riches and Estates in the Kingdom ; which were subject to those small Burdens, which were only said to be in Tenures *in Capite*, and by Knight Service.

It would fall upon those that had no Land, as well as those which had ; as upon Citizens, Mechanics, Children, Servants, and the like ; and heaviest on the poorer Sort of People ; and be a Burden, which the lowly Cobbler, and reverend Applewomen, the Botcher, and Stockingmenders, in their pitiful subterraneous Tenements, and the poor Women, (which in the Streets do cry Fruits and Fish by a double Retail, and pay Twelve Pence a Week for the Loan of Twenty Shillings, and pawn a Petticoat for Security,) the Chimney-Sweepers, Broommen, and Beggars, could not escape.



And, as it could never have been at First settled, without the Awe and Help of Garrisons, Troops of Horse, and Companies of Foot, in every County and City, and the Soldiers' Assistance, to enforce and gather it from those that would not pay it, or were not able,—so, in all Probability, it would now again never be brought into a constant yearly Revenue, without a constant and formerly used Way, of keeping a Standing Army, at the Charge of Sixty or Ninety Thousand Pounds *per Mensem*, or the Month ;—which would be more troublesome and chargeable than Fifty-Two Escheators, and as many Feodaries ; who might be Men of Wisdom, Integrity, and Good Estate, in their Countries.

The next Occasion, given or made, might, it was feared, introduce a Perpetuity of Excise upon all other Things.

And then it might be easily experimented, whether it was better,—to have some, that ought to bear the Charges and Burdens of their Tenures, if they would enjoy their Lands,—or to have the whole Nation groan and lament, under the Burden of maintaining a Standing Army and Garrison by public Assessments ?—to have the Nobility and Gentry of England, and Five or Ten Thousand Men, and all those that held of them, to attend them, and be always in Readiness by the Obligation of their Tenures, without any Charge to the Public,—or Thirty Thousand unruly Soldiers, to be yearly, or for ever, maintained at the Charge of the People ?

To have the Poor bear the Burden of the Rich,—or those to bear the Burden of it, which were not at all concerned in any such Purchase or Alteration, would be an Act, which could have no more Justice or Equity in it, than that the Payment of First-Fruits, which was merely Ecclesiastical, should be distributed and charged for ever upon the Laity, and the other Part of the People, as well as the Clergy.

Therefore, whilst it would be against the People's Oaths,

to desire to purchase off, or diminish, the King's Rights and Jurisdictions,—it would be no less against their own Safety, to weaken the Hands and Power of their Prince, that should protect and defend them; and commit the Trust of protecting and defending the oppressed Poor to the oppressing Rich; the Chickens to the Kites; and the harmless Lambs to the cunning Foxes or greedy Wolves; the Weak and the Innocent to such as should endeavour to hurt them;—and charge and burthen themselves and their Posterities, with a Rent and Excise, for Mischiefs and Inconveniences enough in Perpetuity.

The Objections were never answered,—as indeed they were unanswerable. But they were not suffered to prevail. The Measure was adopted in all its Parts. “The Act (*f*) for taking away the Court of Wards and Liveries; and Tenures in *Capite*, and by Knight's Service; and Purveyance; and for settling a Revenue upon His Majesty in Lieu thereof,” became One of the Laws of the Land. Further Excise Laws, and further Measures of indirect Taxation, rapidly came on; and, in their long and dreary Catalogue, and in the Mutiny Acts, and other Acts, fatally made requisite for their Furtherance, and still encumbering the Statute-Book, we may read the Fulfilment of the Prophecy.

The Intelligence of the People is no more. It is only their Predilections are unchanged. They are not enamoured of their novel Legislation. I think, that, if the Opportunity of a Return to the antient Methods of Taxation and Supply were rendered intelligible to them, they would not hesitate to embrace it. Were the Occasion to come again,—as more than Once it has come,—were the House of Commons, oppressed by Force, or led by free Persuasion, to discontinue their Sitzings, or to break off Communication with their Constituents out of Doors,—I have very little Doubt, that all those dormant Jurisdictions would

immediately, and as though by Concert, awake into Life again, and Vigour; and resume their usurped Functions from the abdicating Hands of Parliament. On this Subject, I must recall to you a very important Reminiscence of Mr. Sheridan's early Days, related by him in the House of Commons.

"Lord North," he said (*g*), "had attempted, at the Close of the American War, to exclude the Public from the House of Commons. He had the Power, and exercised it for above a Session and a Half. What was the Consequence? Every County had its Parliaments; and every Village in the Empire its Delegates. Clubs assembled, and Societies sprang up; for the Discussion of their Rights, and the Examination of their Grievances. The Result, however, was, that the Minister, seeing his Mistake, restored the usual Opportunity of Communication between the People and their Representatives. If he had not done so, no One knew what might have happened. I remember well, that much Mischief was apprehended. But the Danger was dissipated, by the Restoration of that Freedom, which was the most effectual Foe to that Kind of Danger."

It will, no Doubt, occur to some of you, that, within a Year from that Time, Mr. Pitt made his successful Appeal to the Provinces from the hostile Decision of Parliament—the First recorded Instance, let me here observe, of a Contest between the House of Commons and the House of Hanover. That celebrated Appeal, and its immediate Result, the unseating of One Hundred and Sixty Members of the hostile Majority, and the Accession of that Majority to the young and popular Minister, excited the greatest Alarm in the Minds of the Parliament. Of the Extent of that Alarm, the famous Representation, offered by Mr.

(*g*) Debate of the 12th March, 1810, LII. Ann. Reg. p. 97.

Burke, may be mentioned in Evidence (*h*). It may not be too much to conjecture a Connection of the bold Policy of Pitt; with that previous Exhibition, on the People's Part, of their strong, local, and traditional Attachments. We can but lament the more, that the final Result of that Policy should have been, only to strengthen and extend the inordinate Usurpations of Parliament.

It was thus, then, that the Extremities of the State were, One by One, deprived of their Health and Life, and that, One by One, they languished and died. But still the Life of the Body rallied around the Heart, as though it were its last Citadel. The very Concentration of Strength, whilst it impoverished the Extremities, for the Time produced a quicker Pulsation and a fuller Action.

It was so with the Parliament. When that High Court usurped to itself, One after the Other, all the Functions of the numberless independent Jurisdictions which it subjugated, it did not, therefore, neglect its own Functions; nor, so far as it was possible to do otherwise, misuse what it had usurped. The House of Commons continued, for Centuries afterwards, to own and know itself as the Grand Inquest of the Realm. The House of Lords, after the Separation of the Commons, continued to be, and to be styled, (and thenceforth exclusively,) the Great Council of the Realm, for State as for Judicature; and, in either Capacity, only inferior to the Union of both the Houses in Parliament (*i*).

The House of Lords was, to the last, the favourite Tribunal of the People. Suppliants of every Description continued to

(*h*) XXVII. Ann. Reg. p. 75. "A Representation to His Majesty moved in the House of Commons, June 14, 1784;" Burke's Works (American Edit.) Vol. II. p. 375.

(*i*) Compare III. Rot. Parl. 27 Edw. III. pp. 253—7; Lords' First Report, p. 320; III. Proc. and Ord. of Pr. Council, p. 322.

resort to it, to the great Incumbrance of its other Proceedings. Repeatedly do we find it ordered, that the Triers “do receive no more Petitions, unless Public, or of Privilege;” and “of those depending before them, such as are proper to be relieved in other Courts, to dismiss thither.” The last Instance of this Kind, which I have found, is in the Lords’ Journal of the 1st of May, 1642;—not long before the Extinction of the Tribunal which decreed it.

The Calendar of Petitions to the House of Lords, from 1509 to 1642, printed by Authority, although very imperfect, is still an important and valuable Chronicle, which you will do well to consult upon these Subjects (*k*). In that Selection, besides Petitions of Appeal, properly so called, I have found about One Hundred and Thirty undoubted Instances of Petitions, which prayed judicial Investigation and Redress, in the First Instance, or where the Suppliant was too late to present his Appeal. Some of them are from Subjects in the Plantations; others from Merchants-Alien; others from Communities. In some, it is some private Party that is sued; in others, it is some Man of Power, or Influence, under the Crown; in others, the Petition is in the Nature of a Petition of Right, and prays for Remedy against the Crown Itself. The common Modes of despatching Petitions may be seen from the few following Instances.

On the 14th of April, 1624, a Petition was presented in the House of Lords from a Woman named Rogers, complaining of Wrongs done her, and vexatious Suits at Law commenced against her, by Sir Arthur Ingram, concerning certain Lands. It was therefore ordered, that Two

(*k*) Calendar of the Journals of the House of Lords, from the Beginning of the Reign of King Henry VIII. to 30th August, 1642; and from the Restoration, in 1660, to 21st January, 1808; pp. 107—113.

Lords named should hear and determine the Business, if they could; or certify their Opinion; and the Proceedings in the mean Time, in any other Court, to be stayed. Afterwards, those Two Lords having reported, that they had called the Parties, who had come to a final Agreement before them, which they had approved, it was ordered, on the 26th of May, 1644, that the same should be performed accordingly.

On the same Day, the following Petitions were referred to the Court of Chancery, upon their respective Merits;—the Petition of One Mr. Barley, complaining that One Eare had defrauded him of a Manor and Lands of great Value;—of One Wright, “who desired he might be heard upon the true State of his Cause, formerly determined in Chancery;”—of Two, named Edmund and Robert Underwood, stating that a Decree in Chancery was procured by One Pennyman, to put him in Possession of a Manor, purchased by the Petitioners;—and of One King, who had exhibited, in the Court of Requests, his Bill for Lands, whereof he was wrongfully put out of the Possession; and which Bill was dismissed. Also, the Lords, on the same Day, “referred to the Consideration and Commiseration of the Judges, before whom the Quality of the Cause should induce them to complain,” the Petition of One Neville and his Wife, “desiring an End to a Suit, long depending in Chancery, for certain Lands in Essex;” and They recommended, in like Manner, to the Justices of Assise, to give Relief to One Fairfax; who “was utterly undone with tedious Suits at Law.” Upon the same Day, on Petition of One William Mathew, the Lords themselves made the Order for Payment of Monies, and for giving Security for the same; leaving, to the Court of Chancery, only the Execution of the Order. Because a former Order of a similar Kind, in the Case of One Pinckney, had been

disobeyed and “slighted” by the Lord Keeper; and because his Lordship had added to his Offence, by laying Aspersions upon the Sub-Committee of Privileges, in his Answer touching the Matter, which he had been ordered to put in,—he was made to acknowledge his Error, and to ask Pardon of the House, in a Writing; which, having been read, was accepted by the House in full Satisfaction accordingly.

In another Case, their Lordships, on the 6th of May, 1626, awarded an Habeas Corpus, on the Petition of One Horseley, a poor Man and Prisoner in Ludgate, to bring him before them.

Upon the 7th of February, 1628, they absolved One Robert Briscoe, upon his Petition, from the Excommunication of the Chancellor of Carlisle;—“and, in Regard the said Chancellor was a vexatious Man, he was ordered to be sent for, to answer the Complaints against him.”

On the Petition of One Nicholls, touching a Ship captured by him, which was afterwards seized for the King’s Use, and out of which he, the Captor, had not received his full Share,—an Order was made, on the 2nd of May, 1640, in his Favour; and the Case was accordingly represented to His Majesty.

On the 1st of December following, their Lordships held, that General Warrants were illegal;—and, therefore, upon the Petition of One Freeman, complaining that he had been apprehended under a General Warrant of the Privy Council, and that 10*l.* had been extorted from him by the Sergeant at Arms, for Fees upon his Arrest,—it was ordered, that the Money should be refunded, and a Non vult Prosequi entered.

In the Case of the Planters of New England, after hearing Counsel, an Order was made, on the 18th of March, 1640, in Terms of their Petition;—“and certain Lords were appointed, to move the King, that the Restraint on the Petitioners’ Ships might be taken off, and that they might enjoy the Benefit of their Patent.”

On the 16th of July, 1641, by the Petition of One Hurlocke, against One Crane,—for the Loss of his Ship, worth 400*l.*, which Crane had taken,—it appeared that Crane had taken the Ship, as Victualler of the Navy, and under the Prerogative of Purveyance, and that the Loss had happened in a Storm ;—“and, thereupon, the poor Man’s Condition was recommended to the Treasury.”

One George Rookes having petitioned, for an Injury done unto him by a Sentence of the Admiralty, a Sum of Money was ordered to be paid unto him, with Costs, on the 5th of June, 1641. But, the Parties not performing the Order, Rookes again petitioned against them ; and, on the 15th of June, they were ordered to attend ; which they did next Day, by the Lord Admiral ; who then undertook that Sir Henry Martyn should pay 50*l.* to the said Rookes.

I have said, that the People resorted to the House of Lords with their Petitions, down to the Commencement of the Civil War. That Jurisdiction was not restored, until 1660, when it came back with Monarchy. But, with that mean Impolicy, which characterised every Measure of the Restoration, One of the First Proceedings of the House of Lords, was to repudiate the Exercise of those high remedial Functions, which constituted so much of their Worth, and perhaps all their Popularity. On the 8th of June, 1660 (*1*), the Lord Chancellor was directed, that, when any Petitions, proper to be relieved elsewhere, were brought into the House, he was to put the House in Mind of the former Order in that Kind. New Difficulties were interposed, from Time to Time,—Difficulties, which the long Alienation of the popular Affections, by the Events of the Civil War, and the Usurpations which followed it, but too well seconded ;—and the End was, that the Usefulness of the House of Lords,—truly the Hereditary Representative and

(1) Calendar of Journals, &c. p. 251.



Tribune of the People (*m*),—became, in a great Measure, lost. The Triers of Petitions are periodically re-appointed at the Meetings of Parliament,—but they have forgotten their Office, and have therefore lost their own Significance. Yet they may recover both. It is something to see them there,—to know that they are not yet formally abolished by Law. By their Help, the House of Lords may, at any Moment that it pleases, resume its due Ascendancy in the Parliament of these Realms.

¶ The Privy Council, with not very many Exceptions, continued to exercise its antient Control over the Government of the Country, down to the Revolution of 1688. It was not until that new and signal Triumph of the Doctrines of Concentration, that the Affairs of the Realm fell into the hands of the illegal Cabinet, or Cabal; that the Privy Council became permanently displaced; and that, in Contempt of antient Laws,—subsisting still, in 1845, in all their pristine Vigour,—the Powers of the Crown, and the Functions of its Prerogative, were withdrawn from that great and weighty Council, which the Crown has, for all Purposes of State,—and centred in a few Advisers, unauthorised by Law, and irresponsible, except for their Usurpation of that Office (*n*). Thenceforward, the Conspiracies of Cabals, or Cabinets, took the Place of the solemn Deliberations of Councils.

¶ By the Law of this Land, the Privy Council is the principal One, which the Queen has, for all Matters of State. It consists of an indefinite Number of Persons, appointed by Summons; with the Exception of the President, who holds his Seat by Patent. It is his peculiar Duty, to attend the Royal Person, and to represent to Her Majesty the Affairs

(*m*) Compare Lord Lyndhurst's Speeches on the Municipal Corporations' (of England and Ireland) Reform Bills; *Mirr. of Parl.* 1835, Vol. III. p. 2253; and 1836, Vol. III. 2076; and on the Business of the House; *Mirr. of Parl.* 1836, Vol. IV. 2947.

(*n*) *Co. Litt.* 110, a.—VII. *Proceed. and Ordin.* p. cxxxvi.

of the Council. All the Councillors hold Office during the Pleasure, and Life, of the Sovereign. Their Duties are enumerated in their Oath of Office. They are to consult for the Public Good, and for the Honour, Safety, and Profit of the Realm,—to advise the Sovereign without Partiality,—and to keep Her Councils secret. The Crown, on the other Hand, is bound to ask Advice of the Privy Council; although not required to follow it. Still it is competent for Her Minister to refuse to act at all, without the Concurrence of a Majority of the Council.

For Ministers have a plain Rule to follow, in Matters of Importance to the State; that is, humbly to inform the Sovereign, that the same must first be debated and resolved in Council;—which Method being observed, the Minister is safe, and the Council answerable.

The Facility of Conference between the Sovereign and the Privy Council, upon the Measures of Government, cannot fail in all Cases to be productive of the greatest Benefit. Thereby the Sovereign is enabled to impart Information, of great actual Importance, to disinterested and secret Advisers, and, in Return, to receive from them Information and Advice; such as the Secretary of State, or other ministerial Councillors, may have been unable, or unwilling, to give. At every Meeting of the Privy Council, there would be some Man of Ability and Honour, ready to be confronted in the Royal Presence, with those entrusted with the actual Administration of Affairs; and to advise the Sovereign, before any Measure of Importance could have its Course. Resolution, says Lord Coke, should never precede Deliberation, nor Execution go before Resolution. When, on Debate and Deliberation, any Matter is well resolved by the Council, a Change of it, on some private Information, is neither safe nor honourable.

So great was the Respect entertained for this antient Council, that Parliaments have often relieved themselves

of Matters of high Concern, by transferring them, at Once, to the Sovereign in Privy Council ; as possessing, in that Character, the Government of the whole Realm.

The Acts of the Sovereign possessed a great Authority amongst the People, until the Reign of Charles II. For, until that Reign, the Practice was in Conformity with the Law ; and no Acts were confirmed by the King, that were not First approved by the Council.

Cabinet Councils had never been heard of at all, except occasionally in his Father's unhappy Reign ;—when the private Meetings of His most confidential Advisers began to be styled, Meetings of the Cabinet. But, those Meetings being then, as now, unknown to the Constitution, no overt Act of His Government was ever undertaken, upon their Responsibility, nor without the final Assent of the sworn and ostensible Advisers of the Crown, in Privy Council assembled. \ After the Fall of Clarendon, that constitutional Rule was First violated. Charles the Second's Cabal, or Cabinet, ventured to obtain, beforehand, the Royal Approbation of their Measures, and then to lay them before the Privy Council, for a merely formal and nominal Ratification. \ Nor was it attempted,—nor, for obvious Reasons, desired,—to obtain the Sanction of Parliament for the Innovation.

\ In 1679, Sir William Temple, for a Time, succeeded in restoring the lawful Practice. The King promised, “ to lay aside the Use, He may have hitherto made, of any single Ministry, or private Advices, or foreign Committees, for the Direction of His Affairs.” By the constant Advice of a Privy Council, to be chosen “ out of the several Parts which this State is composed of,”—it was declared,—“ His Majesty is resolved henceforth to govern His Kingdoms.”

Subsequently, and upon the Breach of the Royal Promise, the same great Statesman,—after advising the King that, “ in His Affairs, He would please to make Use of some Council

or other, and allow Freedom in their Debates and Advices,"—boldly told Him, without Contradiction, that, "if He did not think the Persons, or Number, of this present Council suited with His Affairs, it was in His Power to dissolve them; and to constitute another, of Twenty, of Ten, or of Five, or any Number He pleased; and to alter them again, when He would;—but, to make Councillors, that should not counsel, he doubted whether it were in His Majesty's Power, or no;—because it implied a Contradiction;" and, upon another Occasion, that "he did not very well understand, why a Thing, agreed upon last Night at Council Table, should be altered in His Chamber" (o).

It was under the Constitution of 1688, that this Violation of Law, which was precarious and occasional under Charles II., became fixed and permanent. No Prince, says Hallam, has been more charged with a Disregard for those constitutional Barriers, than William III. He might have added, that the Guilt of the Proceeding ought to be fairly divided between the Prince who used it, and the Cause which He professed to serve. Certainly, the Parliamentary Majorities, and their Leaders, since the Revolution of 1688, have uniformly acted, after the same Example. They have exhibited, on every Occasion, the same Dislike of each great Barrier of Protection, against the Consequences of corrupt or imbecile Government. The Cabinet Council, without a Line in the Statute-Book to warrant it, and in direct Opposition to every Maxim of Common Law, has become all powerful. The Privy Council,—of which the Law still is, that it continues to regulate and govern all the great National Concerns of this Realm,—is never consulted at all. When it meets, it is but to welcome the new Elevation of some vain Man, ambitious of the Title of Right Honourable,—or to authorise, in dumb Show, upon De-

(o) Memoirs from the Peace in 1679. Sir William Temple's Works, Vol. II. pp. 522, 537; and App. p. 554. (London, 1770).

mand, and without Reason given, the Publication of some Order, or Proclamation, already directed by the Sovereign,—in the Hands of His Cabinet. “That,” exclaimed an indignant Member of the Lower House in King William’s Reign (*p*)—“that has not been the Method of England! If this Method be, you will never know who gives Advice.”

In Truth, all Control over the Proceedings of the Parliamentary Chief of the Day is perfectly eluded, by this Concealment of the Actor. By the daring Substitution of an unlawful Cabinet Council, for the lawful Privy Council, no Adviser, unless his Participation be legally proved by extrinsic Evidence, can be made liable to Impeachment. There is no such Body as a Cabinet Council known to the Law. Hence it follows, that no Cabinet Councillor, merely as such, can be made responsible for his Advice, much less become liable to Punishment.

It is true that the Members of the Cabinet have hitherto been Privy Councillors. But the Privy Council is not summoned for Despatch of Business,—nor is it in their Character of Privy Councillors,—a Character which they share with many of those of the opposite Faction,—that the Members of the Cabinet are consulted;—or, consequently, are answerable. Unless, therefore, some direct Proof be laid, of a personal Participation in giving the Advice, no Cabinet Minister can be holden to answer for the most unlawful Measures of the Cabinet;—that is to say, unless, by a Signature, or the Setting of a Seal, the Responsibility of the particular Person, for the particular Measure, can be proved.

But how to prove it? With the Privy Council, the Book of the Council is lost. The Cabinet not being a Council of State known to the Law,—the Journals of its Proceedings—if it have any Journals,—are of no official Character; and

there is nowhere imposed an Obligation, for the safe Custody or Production of such. A guilty Minister will be the First to avail himself, of so large an Opportunity of Escape. That such Ministers have so availed themselves, from the very Commencement of their Ascendancy, we have the learned Testimony of the Historian Carte. Writing on the Subject of the State Paper Office, he says, that, there all the Letters of the English Ambassadors Abroad, and all the Despatches of our Secretaries of State at Home, are kept in a good Method, and with great Regularity, from the Time of Edward the Fourth to the Revolution;—"since which the Secretaries have generally carried away the Papers (g)." The Antiquary, perhaps, regarded the Abstraction of which he complained, in no other Light, than as it affected his projected History of the Events, to which those Documents referred. No Doubt, that there was Reason to lament it upon that Ground. But, with much more Reason, might that constitutional Writer have deplored the Success of such Measures, for defrauding public Justice, and screening public Crime.

But I do not insist upon this. Let the Case be ever so favourable, still the Responsibility of the Minister remains a dead Letter. He can still disown it; and still offer, in its Place, the supposititious Responsibility of the Cabinet. Thus may every Member of that Cabal shroud himself, in its Darkness, from the Light of the Law, and the Eye of the Accuser;—all the While that the Privy Council subsists, in the same undiminished and unimpaired Authority, which It had in the Days of Old, when Kings made and unmade Their highest Officers, upon Its Recommendation and Remonstrance (r).

(g) Letter to Swift, of the 11th August, 1736; *apud* Roscoe's Works of Swift (London, 1841), Vol. II. p. 777.

(r) III. Hall Const. H. pp. 249—52; I. Proc. and Ordin. p. 84; III. Proc. and Ordin. p. 322; IV. Proc. and Ordin. pp. 109, 137—8.

In the Reign of William the Third, when the popular Excitement on this Subject was at its highest, a temporary Concession was made by the Faction then in Power. But, when the Concession had served the Purpose of appeasing the Excitement, it was almost immediately revoked.

In the Act of Settlement (11 & 12 Will. III. c. 2.), there was inserted a Clause, declaring the Illegality of the standing Practice of Cabinets. It provided that, upon the Accession of George the First, the old Practice should be resumed, and ever afterwards faithfully observed. This was an Admission on the Part of the Parliamentary Cabal, that, from 1688 to the Passing of the Act, they had never made their Practice conformable to the existing Law. It was more. It was as distinct an Announcement as Words could convey, that it was not their Intention to do so for the Future;—not at least under the living Sovereign, nor yet under His Successor Anne. Further it was at that Time imprudent to proceed. The Uncertainty of Issue from the Princess Anne, left it doubtful, whether the Hanoverian Prince would ever obtain Her Succession; and, under those Circumstances, to have offered Him the same Terms, would, to say the least, have been idle and premature.

But the convenient Season at Length drew near;—and both Factions vied to improve it. Within a few Years after the Passing of the Act of Settlement, and in Queen Anne's Reign, a Clause was introduced into a new Act, (4 Ann. c. 8.), by which the Declaratory Clause above mentioned was simply repealed; without any Thing being substituted in its Place. The Result of this extraordinary Proceeding was, merely to leave the Matter as it was by the Common Law, before the Passing of the Act of Settlement. It did not change the Common Law. On the Contrary, it affected to leave it precisely where it stood: and,—in disclosing the deliberate Purpose of its Makers, not to resume the constitutional Practice, of Government by

Privy Council,—it also conveyed their Determination, to do so in open Defiance of the Law they left subsisting;—in Preference to the more decent and formal Procedure, of obtaining, for their Usurpation, the direct Sanction of the Legislature. Theirs was the ignoble Courage, which chose the Violation of positive Law, in Preference to the Facility, which the Repeal of it would give, to the Crimes which they contemplated.

It is the Province of the Citizen to direct—it is the Province of the Judge to award—Animadversion and Censure against Crime, in the Courts where Justice is administered. Two Years ago, a partial Opportunity offered itself, which was not neglected. The Judges of the Land refused, upon that Occasion, to recognise any Authority to command, but by the Royal Prerogative; holding the Law to be the very Essence of all Commandment.

It was a Suit, which arose out of the unlawful Operations of certain Forces of Great Britain, upon the Coasts of China. The Parties themselves were not at all concerned in those Operations. It was their Misfortune only, that, as British Merchants connected with the Chinese Trade, they came within their Scope. Thus the Question of Illegality had to be determined at their Cost, and not, as it ought to have been, upon the Persons of the Men who were the direct Agents in the Proceedings condemned.

The Case was this. The Defendant had contracted to convey, from Liverpool to Canton, and to land there, the Goods of the Plaintiff. On the Arrival of the Vessel, however, the Execution of this Contract was forbidden, by the British Chief Superintendent of Trade, and by the British Commander-in-Chief of the Forces at Canton; and those Forces were employed to compel the Defendant's Obedience. Those Officers, as was alleged on the One Side, and fully admitted on the Other Side, were "Officers of Our Lady the Queen, duly authorised in that Behalf, and



then exercising the Powers of Her Majesty's Government there; according to the Form of the Statute in that Case made and provided, and by Virtue of the Powers and Authorities to them in that Behalf committed." In Consequence of the Non-Performance of this Contract, the Plaintiff brought his Action; insisting that, notwithstanding the Interference of those Officers,—the Defendant was not justified in obeying them,—that "their Authority, if any such existed, was not stated as it ought to have been," (*viz.*, that it was by the lawful Prerogative of the Queen in War, or by Order of the Queen in Privy Council,)—"that no such Authority was conferred upon them by Common or Statute Law,—that, if they had such Authority, its Nature, and how it was conferred upon them, ought to have been stated and shown,—that it was not shown, by what Authority those Officers exercised the Power of Her Majesty's Government,—that Her Majesty's Government did not, by Law, possess the Power claimed on Behalf of the Officers,—and that the Expression itself, 'Her Majesty's Government,' was insensible and ambiguous, and had no known, or definite, or understood Meaning in the Law." Their Lordships, the Justices of the Common Pleas, allowed those Objections to prevail, and unanimously decided for the Plaintiff (s).

"There is no Statement," said the Lord Chief Justice Tindal, "how these Persons, hindering the Defendant, were duly authorised. The Plea does not state, that the Prohibition was an Exercise of the acknowledged Prerogative of the Crown, of the Right of declaring Peace and War. It is not stated that he," [Captain Elliot, the Chief Superintendent,] "had any Orders at all from the Council, However rightly he might have been acting, that cannot be any Reason why *his* Orders should make a sufficient Defence, at Law, for the Breach of this Contract." "Here," said

(s) *Evans v. Hutton*; C. P.; 9th November, 1842; 6 Jurist, p. 1043.

Mr. Justice Coltman, "there is not in Substance any Authority stated. It is merely said, there was an Exercise of Authority *de Facto*." Mr. Justice Erskine, to the same Effect, observed, that "no Interference by Authority had been shown;"—and the Reason, given by Mr. Justice Maule, was, that "the Case had not been argued on the Ground of any Prerogative of the Crown; nor had the Special Orders of the Privy Council been relied on." Finally, Mr. Justice Coltman, in Reference to an Objection made by the Defendant's Counsel, that "it was next to impossible to deduce the Authority from the Government to the Officers," intimated, that, if the Action had been against those Officers, and not against a comparatively innocent Party, even greater Particularity in deducing it would have been held requisite.

You have had, here presented to you, One of the worst of Parliamentary Abuses; I mean, Parliamentary Government.

In the Crown alone, the Law has vested the Prerogative of Government. Administration, disdaining the Law, and laughing to Scorn the Impotence of the Sovereign, claims to derive, and hold, its own Authority, from a Majority in Two Houses, or even in One House of Parliament. The Law imposes, upon the Exercise of the lawful Prerogative of Government, a constant Check and Safeguard, in the Privy Council; a Body of Weight and Character, chosen out of the several Elements which compose the State. Administration chooses no Councillors, but upon the Understanding, that they shall not counsel upon, nor in any manner interfere with the Privacy of, its Measures or Advices. The Law requires, that Parliament, and the Privy Council, shall never cease to scrutinise and question the Course of Administration,—and that always full and satisfactory shall the Ministerial Answers be, to the Interpellations of those august Bodies. Administration refuses to summon the Privy Council at all, but for Holiday Purposes;

and it gets rid of the other controlling Power, the Parliament, by the mere Fact of its own Existence. For, Parliamentary Government having established itself in Defiance of Law, this Result follows, that Parliamentary Control over the Government is lost, and is become a Thing wholly impossible and senseless. The Majority alone can enforce the Responsibility of Ministers. The Majority, having invested itself illegally with the Ensigns of State Power, and obtaining the Nomination of the Men who are to be the Ministers, knows better than to call its own Creatures to an Account. Thus we find ourselves perpetually whirling round the vicious Circle of Statecraft. Parliamentary Control has, in Defiance of Law, been made a Nonentity in the Practice;—because, in Defiance of Law, Parliamentary Government exists, and is established amongst us. And that illegal and usurped Government cannot be put down and chastised;—because Parliament, whose Office it is to put it down and chastise it, has illegally abdicated the Office, by becoming a Partner in the Usurpation.

It scarcely deserves to be remarked, that the periodical Fluctuation of Vice and Error, which reverses, from Time to Time, the Positions of Majority and Minority, affords not even an apparent Exception to the Truth of what has just been advanced. Those Changes respect *the Men in*, not *the Tenure of*, Office. The Faction, which succeeds, is too prudent to institute, into the Conduct of its Predecessor, that Examination, which, when its own Turn shall come to abdicate, it will fear to receive from a Successor. “Live and let Live,” is thus the Principle, upon which the Ins and Outs regulate their Dealings with each other. It is the Paraphrase, by which the modern English have agreed to render the great Christian Precept, “Whatsoever ye would that Men should do unto you, do ye first unto them.” There is a kind of Honesty in it: a Commercial Honesty,—an Honesty of Shopkeepers,—just such an Honesty as

might have been looked for, in former Days, from amongst the Carthaginians;—a Nation not too well renowned for Virtue of a genuine Stamp. So, likewise, there is a Bastard Wisdom in this Habit of Forbearance. No wise Parliamentary Opposition would ever think of exposing the ordinary Mal-practices of the Parliamentary Majority,—those Perquisites of the Bureaux, which, when Vico's Wheel comes round again, themselves may occupy. To act otherwise would be esteemed an extravagant Dissipation of their own contingent Inheritance.

Hence, it does not follow, that, because one Party is expelled from Office by another Party, therefore the latter will call the former to an Account of its Stewardship. But the Evil does not stop here.

It has been remarked by an able Writer, that mere Expulsion from Office not only does not expose, but positively serves to cloak and hide Crime. It has come to be considered a sufficient Punishment, for any Crime of which "a Parliamentary Minister" can be guilty. Wild Rage for frequent Changes of the entire Ministry—sickly Distaste for Impeachments of guilty Ministers—these made their Appearance contemporaneously amongst us. On every Side we hear it contemptuously re-echoed,—“the Days of Impeachment are Past.” On every Side, we hear uttered, the sanguine Prediction of the Dissolution of Cabinets, and their Reconstruction. Since 1688 there have been many Impeachments, or threatened Impeachments, of individual Ministers, and yet only Ten simultaneous and total Changes of Administrations. Out of these last, no less than Four have occurred since 1830. But Impeachments had fallen into Desuetude long before that. The Ministers of the Crown had gradually, and through their own Usurpations, degenerated into Ministers of the House of Commons,—the Grand Inquest of the Land. And therefore, the Safeguard of Impeachment has come to be so utterly neglected, that it is now

insolently pronounced to be an obsolete and useless Institution. Parliament having committed itself, by giving a previous Confidence to every Ministry which it has placed in Power, Men now contend, that to Parliament, and not to the Ministry, belongs the Responsibility of Acts done, or Duties disregarded;—and then our new Theorists turn round upon the *Laudator Temporis acti*, as in their scornful Mood they term the unfrequent Friend of the British Constitution, and invite him, to point out the Way of enforcing that Responsibility, whether upon the Minister, or upon the rebel Majority in Parliament. They ask, how can it be expected that those, who maintain the Minister, will impeach him, for what he does under their Authority? And as for the Parliament itself, represented; of Course, by its Majority—who is to impeach the Parliament? They conclude, that it is therefore plain—that the Safeguards of Responsibility and Impeachment have become obsolete. And, moreover, they have the matchless Effrontery to tell us, that “they were useful Curbs on a monarchical Government, but are useless, when what they restrained has ceased!” That is to say, the Crown,—because the Constitution reposed the Executive Power in its Hands,—needed to be controlled by Parliament; and Parliament was therefore invested, by the Constitution, with the Power to call the Ministers of that Power to an Account, and to impeach them for their Misdemeanours in Office. But,—now that Parliament has usurped the Power of the Crown, and, at the same Time, retained its own,—to the Destruction, as the Parliamentarians themselves contend, of the Two great Safeguards of public Freedom,—no Safeguards are any longer wanted to maintain it!—Nay, more, if we are to believe them, the Liberties of the People actually increase, in an inverse Proportion, as their Safeguards decline; so that “the increasing Liberties of the People are now, in Truth,

superior to what were once their best Safeguards." Here is a doubly false Assumption. It is ludicrously false to say, that the Power of Parliament, and the Freedom of Constituents, are convertible Terms. Every Man, who has read the History of our famous Long Parliament, knows that it is infamously untrue to assert, that those Safeguards have ceased to be. They are, still, that which once they were. The Men of England are changed, but not Her Institutions.

The Men of England are changed indeed. Their Fathers impeached the traitorous Minister. They only intrigue for his Succession. The Minister may find, indeed, that he is detected, and that, for a Season, he cannot prosecute his treasonable Practices with Effect. But he has only to dispose Matters for the Parliamentary Division, that is, to bring about the Defeat and Resignation of the whole Cabinet; and, thenceforward, he is free—free from the Consequences of the Past,—free to weave fresh Plots for future Execution. From the Moment that his Bureau is occupied by his Adversary, he takes a new Departure upon his piratical Navigation. A Sponge is swept over the Record of the Past; and the Handwriting that was against him is effaced. His Colleagues may be his Accomplices or his Dupes: no matter which,—they bear him Company in his honourable Retirement; and they share in his Impunity. "He has to fear," observes an able and eloquent Author, already cited, who has written too little for the Instruction of his Countrymen (†), "no greater Chastisement, than the Fractional Share of the Blame, implied by the Majority, recorded on some Division of the House, against the Ministry in general; and that too, probably, on some Party Question, not referring to his Office, or touching his Conduct. He may walk over to the Opposition Benches, as well flattered by

(†) Robert Monteith, Esquire, Younger, of Carstairs.

blind Partisans, as any of his late Associates in Office. His worst Punishment may be—timely Release from a Responsibility, which he dexterously transfers to the Shoulders of his Opponents and Successors. By mere Parliamentary Defeat, he retires into Ease and Safety. The Chain of Opposition is broken—and a Sponge is swept over the Past. If there be such a Thing, as a Great State Criminal at large,—some Man, conscious of Power abused, and Trust mysteriously betrayed,—think, what Music, in his Ears, must the Babel Tumult of Faction be! He will hail the ignorant Triumph of an Opposition, as a Godsend of Escape and Amnesty. He will invite, exhibit, and magnify, the seeming Penalty which he shares; well satisfied, indeed, if an injured Country will accept such Defeat as Atonement,—and adopt the Dictum, that ‘the Days of Impeachment are past!’”

We must not allow ourselves to be deceived by Names. The Ministerial Majority is but One Cog upon the ever-turning Wheel of Fortune;—and Opposition or Minority is but another. “*Hodiè mihi, Cras tibi.*” The Morrow may see their Situations reversed. Let the Holder of Office be forbearing to his Predecessor. The latter may have been already destined to succeed him in his Turn, when he shall most need Forbearance. He must be blind to the Follies,—he must shut his Eyes to the glaring Crimes,—of the last Occupant of his Office.

Thus, the Minister,—strong in Parliamentary Majorities, and in the Consciousness of a common Interest with his Rivals on the Opposition Side of the House,—laughs to Scorn that heavy Responsibility, with the Reputation of which he beguiles the Public! “Ministers,” says Hallam, “speak loudly of their Responsibility; and are apt, upon the Faith of this imaginary Guarantee, to obtain a previous Confidence from Parliament, and to abuse it with Impunity.”

But, when the popular Cry is raised against them, they shelter themselves behind the guilty Secrecy of their Cabinet, and employ every Ministerial Art, to shift off from each the Burthen of his Liability (u).

Thus, and, to sum up all, in a few Words, the Government of England is, by its Laws, vested solely in the Crown, to be exercised with the sole Advice of the Privy Council; and, for that Advice, the Members of the Council are made responsible to Parliament. Without a new Law being passed, or an old Law being repealed,—and, therefore, by a most glaring and wicked Usurpation,—the Parliament has at once destroyed its proper Function, that of Control, and invaded the Function of Government, vested in the Crown; First, by seizing that Function into its own Hands, and then, by redelivering it to a Knot of Parliamentary Men, unknown to the Constitution, responsible to Nobody, and calling themselves The Cabinet. Finally, this Usurpation is acquiesced in by the People; not a Murmur being raised against it; and, too often, their Acquiescence being signified, in the loud Language of ignorant and guilty Joy, for some factious Victory.

Infraction follows Infraction. Each succeeding Generation improves upon the Degeneracy of the last. Let us take the Case of an unlawful War. Let us examine that which we carried on in Affghanistan.

Such a War, according to all Authorities on English Law, was to be First declared against the Enemy, and then notified by Proclamation to our own Subjects; from which Time only it could be said to have begun. But the Privy Council must have been summoned, before that Proclamation could be published. In that Council, Discussion of the Policy of the War might have taken Place. The Cabinet had here the strongest possible Temptation, to perpetrate another

(u) III. Hall. Const. H. pp. 249—52.



shocking Infraction of the Law, by dispensing with the Solemnities required by the Constitution, and by making War without Proclamation at all. This Practice of Pirates had been more than once alluded to, by some of our old Writers, under the Name of *Bellum, non solenniter denunciatum*; but it had been expressly disclaimed, by all of them, upon England's Part. They spoke of other Nations slipping into War with England, but never of England's doing the same. On the Contrary, it was expressly declared, that a War, when begun by England, "begins only by the King's Proclamation." But Ministers, who were strong enough to deride and violate all Laws with Impunity, were not likely to restrain themselves by such Considerations as those. In the Case of the Affghan War, Secrecy and Irresponsibility were considered expedient by its avowed, as well as by its secret, Promoters. And accordingly, Hostilities were commenced, and a peaceful Kingdom invaded,—without Declaration of War abroad,—without Proclamation at Home. We suddenly slipped into that War, without any Notification of it to our Enemy! There was, indeed, an Order of the Day for the Passage of the Indus. And that has been called the Declaration of Simla. But it was not a Declaration of War. I will not say, that it was not such a Notification, as a noble and generous Power would think it consistent with its Dignity to make. It was worse. It was not even such as the Letter of the Law demanded! Before 1688, that could not have been done with Impunity. The Privy Council could not then have been slighted thus by the Secretary of State, without calling down upon him the jealous Ire of Parliament. But, now, Parliament has usurped the Prerogative;—and the Secretary of State has supplanted the Privy Council (x).

(x) III. Hallam's Const. Hist. p. 251. (Compare, with the foregoing Authorities, what is said, *arguendo*, in the Baron de Bode v. The Queen. Q. B. Hil. T. 1845. (Printed Case, pp. 269—70.)

I have mentioned the Secretary of State. That Officer was formerly called the King's Secretary; and he acted in that Capacity, as a Clerk of the King's Council. He had no other Authority beyond that which the occasional Orders, received by him from the Sovereign, or His Councils, empowered him to exercise. When Lord Bolingbroke was Secretary of State, even that bold and ambitious Statesman felt himself compelled, to acquaint the British Plenipotentiaries at Utrecht, that "he could give no Instructions, till their Letter was considered by the Lords of the Council" (y). When Lord Strafford's Papers, relating to the same Negotiations, were demanded by Lord Townshend, Lord Bolingbroke's Successor in the Secretaryship of State, —although by the King's Command, and to be laid before the Council,—that Ambassador refused "to comply with the Demand, unless he had an express Order from the Council in Writing." [Nor was it, until after the Privy Council had been summoned accordingly,—and having examined Lord Strafford, had made the Order for Production, that Lord Townshend and Mr. Stanhope, the Two Secretaries of State, named in the Order, were enabled to obtain the Papers demanded (z).

(y) Letter of the 10th Sept. 1712; apud Commons' Report, relating to the Negotiations for Peace; 1715:—(VII. Parl. Hist. App. p. lvi.)

(z) The Order in Council was as follows:—

"At the Court of *St. James's*, the 11th day of *January*, 1714.

"PRESENT, *The King's Most Excellent Majesty, in Council.*

"It was this Day thought fit, and accordingly ordered, by His Majesty in Council, that the Right Honourable the Lord Viscount *Townshend*, and *James Stanhope*, Esq., Principal Secretaries of State, do forthwith repair to the Right Honourable the Earl of *Strafford*, and receive, from his Lordship, the Original Instructions and Orders, and all Letters, which he has receiv'd, from any Minister of the late Queen, or any foreign Prince, or Minister, and Copies of all Instructions, of which he has not the Originals, and also of all Letters, writ

But now, by a similar Abuse, this inferior Officer has gradually grown into a most influential Minister of State. I know that there have been passed, from Time to Time, since 1688, Statutes, in which the Office is expressly named, and by which specific Powers have been, in specific and temporary Cases, conferred upon the Secretary of State. But that is all. Of the important Functions, and the formidable Powers of that Minister, there is not One, which can be traced to any defined or legal Source. Of all his Functions, there is not One, older than the Reign of Charles the Second, and there are few, older than that of William the Third. Nevertheless, this merely clerical Channel, for conveying the Sovereign's Commands (a) has now,—without any Letters Patent from the Crown, without One Act of the Legislature, and by Ways altogether mysterious and sinister,—become a most powerful Minister of State. His Authority to use the King's Name is now not disputed by any One. In the present Distribution of the Functions of his Office, among Three Individuals of co-ordinate Authority,—but making together only One Principal Secretary of State (b),—he performs most of the Functions of the Government, in the Name, and by the Support, of his Majority

by him to any Person whatsoever, relating to his Negotiations, from the Time of his First being at the *Hague*, seal'd up with his Lordship's Seal, and to transmit them to the Council Office, to be there safely kept, and seal'd up by the Lord President's Seal. In Case the said Papers should be too numerous to be now brought away, then they are to be seal'd up, by the said Secretaries of State, in a proper Box, till they can be conveniently deliver'd to the said Secretaries, in Manner aforesaid. *Christopher Musgrave.*" (I. Historical Register for 1714; pp. 81—2. Compare VII. Parl. History, p. 25.)

(a) VI. Proc. & Ord. &c. p. cxxvi.

(b) I. State Papers, p. xii.

in Parliament, and with all but undefined Powers and an unlimited Authority. The Parliaments of George II. and George III. bestowed upon him, in certain Cases, an equal Consideration with the Privy Council itself;—by leaving it to his Discretion, whether the arbitrary Measures, from Time to Time passed, for suspending *Habeas Corpus*, and for other Violations of Liberty, should be carried into Execution under the Warrant of the Elect “Six of the Privy Council,” or under that of “any of His Majesty’s Secretaries of State” (c).

He has even come to be considered a great constitutional Bulwark of the Subjects’ Liberties, and a great Barrier against Encroachments by the Crown. The Office of King’s Private Secretary, on the other Hand,—although, in Point of Law, identical with that of Secretary of State,—was publicly denounced, in a Parliament of George the Fourth,—then Prince Regent,—as “destructive of fundamental Principles.” If Lord Castlereagh had not re-assured the House,—by undertaking, that the King’s Pleasure should not bind the Allegiance of any Man, unless it were communicated through Himself, or some other Secretary of State,—the Office would, in all Probability, have ceased to be. Thus re-assured, the House allowed it to stand. But the Majority was not a large One (d)!

It is no unfamiliar Objection, that the Abuses, against which I raise my Voice, are general, and, in a Manner, the settled Order of Things;—and that it is vain to hope that they will ever be shaken. But it is altogether a Fallacy, “*Communiter usitata, et adprobata*,”—where the Usage is common enough, and sufficiently antient,—do undoubtedly

(c) 19 G. II. c. 1; 34 G. III. c. 54; 57 G. III. cc. 3, 55.

(d) VI. Proc. and Ord. p. cxxxiv.

obtain the Force of Law. But then we must be certain that the Usage is an approved One.

When the Illegality of General Warrants was First made the Subject of Animadversion, and Chastisement, in Courts of Justice, it was argued, in Defence of the Secretary of State, by the Law Officers of King George the Third, that there could be no Abuse of such Warrants; and that the Courts of Justice would fence them with proper Checks;—that such Warrants had issued frequently since the Revolution; which Practice had been found by the special Verdict;—that they had been so executed, without Resistance on the Part of the Subject;—that no Action had been brought to try the Right;—and that, although they had been often read upon the Returns of Habeas Corpus, yet no Court of Justice had ever declared them illegal. But the fallacious Argument did not prevail.

Precautions against the Abuse of that pretended Power, observed the great Chief Justice Pratt (e), would have been long since established by Law, if the Power itself had been legal. The Want of them was an undeniable Argument against the Legality of the Thing. What would, demanded that great Judge, the Parliament say, if the Judges should take upon themselves, to mould an unlawful Power into a convenient Authority, by new Restrictions? That would be, not Judgment, but Legislation. As to the Practice since the Revolution, and the Argument, that an Usage, tolerated from the Era of Liberty, and continued downwards to that Time, through the best Ages of the Constitution, the Answer was of the shortest. If the Practice began then, it began too late to be Law now. Every Lawyer would tell them, that it was much too modern to be Evi-

(e) Entick v. Carrington; XIX. How. St. Tr. pp. 1064, 1067—8, 1074.

dence of the Common Law. If it was more antient, the Revolution was not to answer for it. "I could have wished," his Lordship added, "that, upon this Occasion, the Revolution had not been considered as the only Basis of our Liberty." That there had been a general Submission, and no Action brought to try the Right, he did not deny. But it was a Submission of Guilt and Poverty, to Power, and the Terror of Punishment. It would be strange Doctrine to assert, that all the People of this Land were bound to acknowledge that to be Universal Law, which a few Criminals had been afraid to dispute. Nor did the Warrants acquire any Strength, by the Silence of those Courts, which had heard them read so often, upon Returns, without Censure or Animadversion. The Court of King's Bench had lately declared, with great Unanimity, in the Case of General Warrants, that,—as no Objection was taken to them upon the Returns, and the Matter passed *sub Silentio*, the Precedents were of no Weight. His Lordship most heartily concurred in that Opinion,—together with the other Justices of the Court of Common Pleas; and they unanimously decided, that the Warrant of the Secretary of State then before them, being a General Warrant, was, therefore, illegal and void.

By that Decision, an End was put to the unlawful Practice which it condemned, at Once and for Ever. No Secretary of State, since 1765, has dared to set his Hand to another General Warrant.

But the Judgment of the Court of Law, on that Occasion, struck at the Cabinet alone, and not also at its Standing Majority, within the House of Commons. General Warrants were issued, and executed, before the Secretary of State,—in the Words of Lord Camden (f),—

(f) Entick v. Carrington, XIX. How. St. Tr. p. 1058.

assumed his Power as a Transfer, I know not how, of the Royal Authority to himself. They continued to be issued, and executed, after the Secretary of State, yielding a reluctant Obedience to the Judgment of Courts of Law, had discontinued them altogether. One such Warrant was issued, and executed, but the other Day. The Legality of that Warrant is, even now, under the Consideration of Her Majesty's Justices of the Queen's Bench. It is the First Time, that this important Question, in its present Shape, has ever been raised at all. Centuries had intervened, since the Practice, now complained of, came into Existence. There had been a larger Usage, and a more general Submission, in its Favour, than ever Lord Halifax,—the Secretary of State, who signed that Warrant, which drew down the Censures of the Judges of Common Pleas in the last Century,—was able to adduce in Justification of his Act. But the Submission, which is yielded by Timidity and Weakness, to Usurpation and Force, is no Acknowledgment,—such as should bind the Subject; and no Degree of Antiquity can give Sanction to an Usage bad in itself (g).

I shall not pursue this Matter any further. To do so would be unbecoming in me, and disrespectful to the learned Judges; who are even now deliberating upon their Judgment. I will merely remark,—for it is an alarming Fact, and suggestive of most painful Considerations,—that the General Warrant, to which I allude, was subscribed by the present Speaker of the House of Commons;—and that the House, in justifying his Act, has asserted, for itself, the Privilege of issuing such Warrants at Will. Happily, it is before a Court of Justice, that this monstrous Pre-

(g) So expressly held, *per* Lord Mansfield, C. J., and Wilmut, Yates, and Aston, J. J.; in *Leach v. Money* and others; K. B. Easter Term, 5 Geo. III. XIX. How. St. Tr. p. 1027.

tention has been raised ; and it will be dealt with there, in such Manner as shall best beseem the Dignity of Justice, and its Ministers. Be assured,—that they will not suffer those Liberties of England,—which their Predecessors vindicated, against a Servant of the Crown,—to be enslaved by a Faction of Crown Councillors (A).

I have now to direct you to some curious and important Facts, upon the startling Increase of Taxes and Expen-

(A) The Expectation has been realised. In last Trinity Term, (15 May, 1845), Judgment was given, by the Court of Queen's Bench, in *Howard v. Gosset*, Knight, in Favour of the Plaintiff, and against the Privilege as claimed. In giving his Reasons, for concurring in that Judgment, Coleridge, J., said :—

“ The Defendant's First Point states, that he, being an Officer of the House, is protected by an Order of the House, directing him to do to the Plaintiff the identical Act complained of ; that such an Order is of itself, and without more, an Answer to the Action. In the Argument, this Point, though stated to be unnecessary for the Defence, was insisted on. No Exception was admitted to the Truth, no Limit imposed on the Generality, of the Proposition. What the Quality of the Act commanded may be, is not to be enquired into. It is enough that the House has ordered it ; and, as the House is irresponsible, so must its Officer be. I do not wish to misrepresent the Language used. But I think I am bound so to understand it, as resting the Defence of the Officer, not on the Quality of the Thing commanded, but on the unlimited Extent of the Authority, from which the Command proceeded. If this were not so, Language most alarming has been most wantonly or carelessly used, by those whom I, with Reason, respect too much, to believe them capable of being wanton or careless, in any Matter ; least of all in such a Matter as this. But, so understood, I will venture to say, that the Proposition is not only untenable, but monstrous. Extreme as it is, it might not unreasonably be met with extreme Suppositions. A Proposition, universally affirmative, cannot be true, if the Negative of it be true in any one Particular ; and it is no Answer to say, that an Abuse of such extreme Power, in our representative Body, cannot be respectfully or even decently presumed. I will presume nothing.



diture, which followed the Revolution of 1688, as Effect follows Cause. I quote from Mr. Cunningham's learned History of English Taxation, compiled not long after the Accession of George III. The Result he gives you, after enumerating several antient and modern Impositions, which existed before the Revolution, is this (i).

Those Taxes, with several other small Branches, not worth particularising, were all that we were subject to at the Time of the Revolution ; and, at the highest Computation,

We ought to have, I admit, the fullest Confidence in the Humanity, the Justice, or the Integrity of the House. It is entitled to our most sincere Veneration. But we have a Right to consider our Liberties, as independent of any such Qualities, in those who are in Authority ; as resting on Laws ; as things not precarious ; but which we hold by Right and Charter. When Lord Camden delivered his memorable Judgment in *Entick v. Carrington*, (best reported, in the State Trials, under the Title of the Case of Seizure of Papers,) he thought it a legitimate Mode of proving the Illegality of the Warrant, to show the Consequences of its being legal, on the Security of private Papers and Confidences of every Englishman ; how it placed at the Discretion of the Crown the secret Papers, the Cabinet and Bureau, of every Englishman in the Land, however innocent. If Time allowed,—and I was so disposed,—how much more strong a Picture, without the slightest Exaggeration of a Feature, might be drawn, of the State in which we should live by Law, as to the Security of Property, Liberty of Person, Safety of Character, or Life itself, if the Propositions, contended for on the Part of the Defendant, were really sanctioned by that Law ? But it is needless, and I gladly forbear. It is enough to say, that the Law is supreme over the House of Commons, and over the Crown itself. If the Limits of the Law be passed by either,—for most satisfactory Reasons,—they are indeed themselves irresponsible. But the Law will require a strict Account of the Acts of all Persons and their Agents ; and those, according to the Nature of the Illegality, will be answerable, civilly or criminally." [Arguments and Judgment in the Case of *Howard v. Gosset, Knight*—Parliamentary Paper, pp. 104—5.]

(i) History of Taxes, (2nd Edit.) p. 30.

they produced but 2,061,856*l.* 7*s.* 9½*d.* And yet, with that Revenue, King James II. supported His Civil List, kept a formidable Navy, ready to put to Sea, an Army of near 30,000 Men on Land, and saved Money yearly; if we can credit an Account of the Issues of His Revenue, given in to Parliament; which amounted to no more, at a Medium, than 1,609,365*l.* 2*s.* 9*d.* (*k*).

At the Time of the Revolution, there were no National Debts, properly so called. There was, indeed, a Debt of Sixty Thousand Pounds, due to the Servants of King Charles the Second, which His Successor neglected to pay; and the Payment of it was provided for, by an Act of the First Session after the Revolution. As to the Debt, called the Bankers' Debt,—though charged by Letters Patent from King Charles the Second upon the Hereditary Excise,—no Provision was made by Parliament for its Payment until the Twelfth of King William, when it was enacted by Parliament, that, in Discharge of certain Annual Payments and Arrears thereof, granted by King Charles the Second to several Patentees, out of the Hereditary Excise, the same Excise should, from the 26th of December, 1705, stand charged, for ever, with the payment of Three Pounds per Cent. per Annum, for the Principal Sums of the Owners, their Heirs and Assigns, for ever; nevertheless redeemable, upon Payment of a Moiety of the principal Sums;—by which Means, the Nation became charged with a

(*k*) From the Table of "Sums Total of the Supplies and Ways and Means, Yearly, from the Revolution to the present Session," (1771), given at the End of the Volume, it appears that, in the First Year of William's Reign, the Supplies had risen to 2,908,680*l.* and that, in the last Year of His Reign, only Thirteen Years afterwards, the Supplies had already been increased to the Sum of 4,380,045*l.* 11*s.* In 1771, the last Year included in the Table, they were 8,111,276*l.* 13*s.* 2½*d.* In 1844, they were, 50,345,934*l.* (7 & 8 Vict. c. 104).

Debt of 664,268*l.*, being the moiety of 1,328,526*l.*, which those principal Sums amounted to, and which is the only Debt we are now charged with, that had any Part of its Rise before the Revolution.

Those were our Customs, he says again, subsisting at the End of Queen Anne's Reign. From that short State of them, Men might see, what a Labyrinth our Merchants must be in. But, if they considered the many Exceptions, and Exceptions from Exceptions,—the many Regulations, and Regulations of Regulations, for collecting those Customs, and for paying the Drawbacks upon Goods re-exported,—they must conclude it impossible, for any Merchant in this Country to be Master of his Business,—if he were what was called a general Merchant; consequently he must trust to those Gentlemen, called Custom House Officers, both for the Duties he was to pay, upon Importation, and the Drawbacks he was entitled to upon Exportation. Could they wonder, at the Decay of their Commerce under such Circumstances? Should they not rather wonder that they had any left?

Thus they had, at last, made an End of the long List of Taxes, which were subsisting at the End of Queen Anne's Reign. But there were several others, that, like noisome Meteors, made their Appearance for a Year or more, and then vanished.

All the Taxes, which subsisted at the Beginning of the former Reign, were subsisting at the Beginning of that of George II., with some few Alterations; and all except the Land and Malt Taxes, and a very few others, were now established for ever. But the Method of perpetuating our Taxes had been greatly altered in favour of the Crown. For, when Taxes first began to be granted, for ever, as a Security upon the Money to be borrowed upon them, it was, as to many of them, provided by the Act, that granted them, that, as soon as the Money, borrowed upon them,

with all Arrears of Interest, should be fully paid and satisfied, the Taxes should cease, and be no longer payable. But those and all other Taxes had since been granted for ever; with a Provision only, that, after the Money, borrowed upon them, with all Arrears of Interest, should be fully paid and satisfied, the Produce should not be issued, without the Authority of Parliament, or should be at the Disposal of Parliament. Between those Two Methods of granting, the Reader must see a very remarkable Difference, with Regard to the Security of our Constitution. By the First Method, the Tax ceased of itself, as soon as the Money borrowed upon it was paid off; and the People would no longer be bound by Law to pay it. But, by the Second Method, the People remained bound, by Law, to pay the Tax, even after the Money borrowed upon it had been satisfied; nay, they must remain so bound, until the Crown had consented to an Act, for repealing that, by which the Tax was granted:—and, surely, a tyrannical Sovereign might more easily prevail with the Officers, of His Exchequer, to issue the Money in their Hands, without Authority of Parliament, than He could prevail, with the People, to pay any Tax whatsoever, without the Authority of Parliament. A full Payment of all the National Debt,—which was indeed an Event not much to be dreaded, would now therefore be One of the most dangerous Things that could happen to our Constitution; because the King would then have a Revenue of above Four Millions, coming yearly into His Exchequer, without any new Grant from Parliament; and, after its being Once there, it would be very easy for Him to make Himself Master of it,—which Revenue would effectually enable Him, to render His Proclamations of equal Force with an Act of Parliament;—especially if our Parliaments, by a continued Course of Corruption and Screening, should render themselves distasteful to the People.

Thus, he concludes, we had subsisting, at the Beginning of that Reign, Thirty-Eight Branches of Customs, Twenty-Nine Branches of Excise, and Eighteen Branches of Inland Duties; in all, Eighty-Five different Kinds of Taxes; many of which Branches affected a great Variety of Sorts of Goods. And the Laws relating to them made, by far, the greatest Part of the many large folio Volumes of Statutes, that had been enacted since the Revolution; "whereas all the Statutes, from the Beginning of our Monarchy to that famous Era, and including the original French, and Latin, and English, Translation, were contained in Two Folio Volumes; of which those, that related to Taxes, made but a very inconsiderable Part." The actual State of Things should throw that Sketch of former Days into the Shade.

Another Instance occurs to me. In 1834, the Revenue amounted to upwards of Fifty-Four Millions Sterling;—of which more than Seven Millions were wasted, or abstracted, in the Passage of the Remainder into the Bank of England,—that unconstitutional Substitution, of modern Times, for the Court of Exchequer—over and above the Sums subsequently subtracted from the Remainder. The net Amount was all that that potent Corporation, at once Creditor, Receiver, and Trustee, permitted the Crown to dispose of for the public Service. In 1844, the Revenue amounted to 59,917,494*l.* 18*s.* 6*d.*; and the Deductions, in like Manner, amounted to 5,913,741*l.* 6*s.* 10*d.*; the Net Amount alone being paid into the Bank; and again to be subjected to further Diminution there, before any Portion of it was made available, for the Purposes for which the Whole had been originally voted (*g*).

Moreover, all the Taxes, except the Sugar Duties, are now permanent, or at least settled for fixed Terms of Years. But

(*g*) Parl. Ret. of Finance Accounts of the United Kingdom, for the Year 1844, ended 5th Jan. 1845. No. 147. Class I. pp. 8—9.

the Sugar Duties, which are annually voted, are already mortgaged heavily to the Public Creditor. Of these only a Portion is applicable to the Year's Supply, and, taken together, the Sum thus obtained does not exceed Three Millions. Under these Circumstances, as a financial Writer of the present Day observes, the House of Commons has effectually ceased to be the Guardian of the Public Purse;—because it has, by its own Act, made away with its antient Power of Refusal (*A*).

Such, then, have been the Fruits of a Parliamentary Title to the Crown, and—its inevitable Consequence— of a Parliamentary Government.

I know that it was in the Days of the Second Charles that Cabals and Cabinets began, and not First in the Days of William of Orange. But, in those Days, the Monarch was still free to rule, and the Parliament still free to counsel. The House of Commons was not the governing, but the controlling Power; and Place did not as yet depend upon the Division Lists. Far otherwise was it, when Parliament abandoned the Supervision of others, and became the Principal in their Crimes! Before then, its Interference had indeed, upon Occasions, been made use of by the profligate and the ambitious. But then it was only the Exception. Henceforward it was to constitute the Rule.

In the Reign of James the First, the Palatinate afforded an Example, of what the Factions of Parliament was competent to achieve, when leagued with Corruption at the Treasury. That celebrated Question, which so long agitated England, obtained its Popularity here, not from any Goodness in the Cause, but from the secret Alliance, which at that Time subsisted between, the infamous Duke of Buckingham and a Puritan Majority in the Lower House.

(*A*) Wells on Revenue and Expenditure, pp. 179—80; and compare his "True State of the National Finances," (1842,) pp. 11—12, 23, 44—5, 97—8. See also the Act 7 & 8 Vict. c. 28.

The King Himself made no Secret of His Aversion to the War, and of His Conviction, that the Spanish Monarch was perfectly warranted, in the Course which He had taken, with Regard to the Prince Palatine. Still, to satisfy the Demands of His unworthy Favourite, He summoned the Privy Council to meet Him at Whitehall, and required them to deliver Their Opinions on the Two following Questions—1. Had Philip been guilty of Insincerity, in the Negotiation of Marriage between Prince Charles and the Infanta? 2. Would His Conduct, in that Part of it which related to the Palatinate, warrant a Declaration of War? On both Points, the Decision of the Lords was unanimous, with the single Exception of Buckingham; and it was given in the Negative. They declared that there was no Ground to suspect the Spanish King, nor to invade His Territory.

“Hereupon,” says a Contemporary (i), “the Parliament of this Kingdom was procured by the Duke, because he thought his Plots would be most acceptable to the Puritans;—not without great Injury to Your Council of State, from which he fled, and disclaimed by Way of Appeal?” The Houses met. Buckingham addressed them. The Factious Majority, artfully handled by that bold and profligate Man, enabled him, in Five short Days, to triumph over the Reluctance of the Monarch, and the Judicial Determination of His Council, and to plunge the Nation into a wicked and disastrous War.

But, compared with the Times in which our Lot is cast, Instances such as these are rare in the Annals of former Times. Then, there was Intelligence remaining in the Land to discover, and Justice to condemn them; and, when they did occur, they were met with Reprobation. Of every Crime, the Ignominy was remembered in its Epitaph; nor

(i) Cabala, 274; *apud* Tierney's Dodd's Church History of England; Vol. V. pp. 118—19.

did the very Person of the Criminal, in the End, always escape the just Judgment, which the Law awarded to his Guilt. At least, the Sentence of his Fellow-Men, upon the Character of his Acts and Deserts, was never withheld; neither was that tremendous Sentence One, which could be evaded. Those were Days, wherein "Opinion" was unknown, and Judgment was all in all. But, now, the "Public Opinion" has supplanted all Judgment;—and that Opinion has marched, and is marching;—and so the Hatred of Sin will soon become as obsolete as the Impeachment of it.

Still the Law subsists, and the Duty—the solemn Duty imposed upon you,—and upon me,—and upon every One of its Subjects,—to watch over it, to maintain it, to perform our own Obligations towards it, and to enforce the same Obedience to it from others. The Culprit may violate it, but he doth not make it void. It is there still. It is there to punish the Violation, and to assert the Right. Times may change. Manners and Men may cease to obey,—may begin everywhere to disobey. But there is no Change in the Law;—there is no Demise of Jurisdiction;—there is no Cesser of Commandment. What was Right in the Thirteenth Century, is not Wrong in this. What was sinful then is now, and must for ever be, forbidden unto us.



## LECTURE VI.

## REVOLUTION OF 1688—HANOVERIAN ERA—CONCLUSION.

“WHO shall command the King?” was the haughty Demand of the great Prerogative Lawyer, Lord Finch, in the Day of the Stuarts. That once celebrated Saying is now out of Date. Now the Question is, “Who shall command the Parliament?” To place the Monarch above the Law, is no longer an Object of Ambition or Interest to any One of Her Subjects. The personal Views of Men now lead them the other Way. The Endeavour is now, in Affront of the Prerogative, and in Invasion of the Crown. Sharing with its antient Enemy the Profits, and therewith purchasing the Indemnity of the Crime,—the Cabal, no longer under the Observation and Control, has now secured the Countenance and Support of Parliament. The Crown, always dependent on that Body for its Supplies, has now to accept even its Servants from their Pleasure. The Compact, indeed, stands condemned and branded before the Law. But the Royal Head of the Law, and even the Law itself, are in the Hands of the Confederates. You will remember the Passage in Blackstone, and the Claim he put forward in their Name, to the Right of suspending, altering, and abolishing, all Laws at Pleasure, and, generally, of binding the Allegiance of every Citizen in the Empire to the Changes so produced, and even of making him, against his Will, a Party and Accomplice. The Act of Parliament, they say, is the Act of every Man in the Empire; and, to

the Making of Acts of Parliament, there are no Bounds or Limits, but those of natural Possibility. Thus they, who, under Colour of Freedom, decry not only the Abuse of Prerogative, but the Prerogative itself,—a Prerogative which is Part of the Law of England,—do not scruple to assert, in themselves, a Prerogative which the Law of England condemns, and to set that Prerogative upon a Height to which, in the worst of Times, the Abuse of lawful Prerogative never reached. Had Finch lived in these Days, he would perhaps have shaped his Question accordingly ; and, instead of paying his Court where it could no longer be rewarded, he, with all the Insolence of modern and constitutional Placemen, would have demanded “ Who shall command the Parliament ? ”

The Law shall command the Parliament ! The Law shall command the Queen ! When the Queen endeavours to oppress, or Parliament to destroy the Law, their Endeavour is vain ; their Act a Nullity. The Queen can do no Wrong. The Parliament can do no Wrong. No Man shall suffer Wrong, through any Act of the Queen, or of the Parliament.

Thus, as the Law has provided against the Abuse of Power by the Crown, so has it provided against the Abuse of Power by the Parliament.

The Executive Authority is vested wholly and solely in the Crown. But, in exercising its Prerogative, the Crown is limited and confined, by its great constitutional Necessity of Counsel and Co-operation. There are Ministers of State ; there are Councils of State ; there are Courts of Judicature. They are the Organs of the Monarch ; having Functions assigned to each ; which each must exercise in the Service of the Monarch ; and of which She cannot deprive them, nor refuse to accept the Performance. And, lastly, over all these, there watches the superintending

Power of Parliament ;—a Power that controls, but cannot initiate.

Legislation is vested in the Sovereign in Parliament. But the Constitution has, in like Manner, guarded against the Abuse of that Power, so tremendous in the Exercise. There is reserved, to the Queen, the Prerogative of construing the Meaning and Validity, and of determining the Application of all Acts of Parliament. That Prerogative cannot be exercised, by the Sovereign, except through the Instrumentality, and upon the Responsibility, of Her ordinary Councils of State and Courts of Justice. Should an Act of Parliament be made against Law, it belongs to the Ministers of Law to declare the Nullity of the Act. If it be not illegal simply, or of its own Nature, but is liable to become either illegal or unjust in the Application, it belongs to the Ministers of State to dispense with it, yet to the Extent only which such Liability shall indicate.

The Dispensation, so given, confers Capacity and Confidence, "Notwithstanding any Statute to the Contrary." Those Words are essential to the Dispensation, and are always inserted. Hence the Term "Non Obstante," is, in our Law, used synonymously with Dispensation, or the Prerogative thereof.

"It is," said Lord Chief Baron Atkyns (*a*), "an Indulging of a Privilege to some particular Person, or to a Corporation, allowing him or them to do a Thing, that is prohibited by some Act of Parliament, (under a Penalty,) without incurring the Penalty ; the Doing whereof was lawful to all, till that particular Law did make it an Offence to do it." "A new Law," he elsewhere says (*b*), "may sit heavy upon some particular Persons, in some extraordinary Case that may happen, let what Care can be taken

(*a*) Enquiry into the Power of dispensing with Penal Statutes, p. 13.

(*b*) *Ib.* p. 10.

in the Penning of it. Laws are fitted *ad ea quæ frequentius accidunt*, and not for rare and extraordinary Events and Accidents."

"*Dispensatio Mali Prohibiti*,"—says Lord Coke,, "est, de Jure, Domino Regi concessa, propter Impossibilitatem prævidendi de omnibus Particularibus. *Dispensatio est Mali Prohibiti provida Relaxatio, Utilitate seu Necessitate pensata*" (c).

"A Dispensation, or Licence, without any Limitation or Stint, is utterly against Law" (d).

The Distinction, therefore, between Dispensations and Suspensions, with which last the former have been ignorantly confounded, is sufficient and obvious.

A Dispensation exercises itself upon some particular Case, having good and essential Grounds to justify it; for, without the Combination of both of these, it cannot be supported. The Duty of dispensing with Laws is a judicial Function inseparable from the Person of the Sovereign.

A Suspension is general, and needs no lesser Grounds than such as are required for an Act of Parliament. Consequently, it is no more in the Power of the Monarch to suspend Laws, without the Concurrence of the Estates of the Legislature, than it is in Her Power to make them. Those Functions belong to the Queen in Parliament.

To illustrate this Difference, let me take the celebrated Declaration of Liberty of Conscience, which cost James the Second His Kingdom. No Doubt, that was an illegal Measure. It undertook, at Once, says Lord Chief Justice Herbert (e), totally to suspend and lay asleep all the Laws that concerned Non-Conformity to the Established Worship,

(c) Case of Monopolies, 11. Rep. 88 a.; Co. Lit. 99 a.

(d) 11. Rep. 88 a.

(e) A short Account of the Authorities at Law, &c. *apud* XI. How. St. Tr. p. 1253.

and to give a General Liberty of Conscience to the whole Realm. It was, in Fact, a Suspension of the Penal Statutes, and, as such, beyond the Competence of the Monarch, acting otherwise than in Conjunction with the Parliament. But, had James confined it to certain Persons by Name,—however numerous,—had He exempted them, without mentioning others, from the Operation of those Statutes,—it had previously been decided in Sir Edward Hale's Case (*f*), that that was a Grant which it was within His Power to make, upon the ordinary Responsibility of His Constitutional Advisers.

The main Restriction, which the Constitution has imposed upon this Prerogative, is, simply, that it shall not work Injustice ; the same, in Fact, by which is limited and confined the Chancellor, in the Exercise of those enormous Powers, which he derives from the same Prerogative. Thus, it cannot be exercised to the Prejudice of Private Rights—of the Commonwealth—of other Nations—of Religion—nor of the Moral Law. Within these Bounds, a great Latitude is left to the judicial Discretion of the Monarch ; but, for the Exercise of that Discretion, Her Ministers are still held responsible.

“There is a Diversity,” remarks Chief Justice Fineux (*g*), “between *Malum Prohibitum*, and *Malum per Se*. For it is *Malum Prohibitum*, where the Statute forbiddeth One to make Money ;—and if he do, that he be hanged. That is *Malum Prohibitum*. For, afore the Statute, it was a lawful Act to make Money ; but not now-a-days ; and for this Crime the King may dispense. So, if One shippeth Wool elsewhere than at Calice, that is *Malum Prohibitum* ; for it is forbidden by Statute ; and for that *Malum* the King may dispense. So may the King dispense with a Priest, to

(*f*) “A short Account of the Authorities at Law,” &c. *apud* XI. How. St. Tr. p. 1253.

(*g*) Year Book, 11 Hen. VII. f. 11, 12.

have Two Livings, and with a Bastard, to be a Priest; and that is *Malum Prohibitum*; and in such like Cases. But with *Malum in Se*, the King nor none other may dispense. As, if the King would give Power to slay another, or license him to make a Nuisance in the Highway, it is void. But still, when that they be done, the King may pardon them. So is it, if One be bounden in a Recognisance, in Chancery, to the King, for Keeping of the Peace at another Man's Suit, the King may not release this Duty, to the Prejudice that may chance unto the other. But still, when that it is forfeited, He may well release it; and before not. And so, the King, nor no Bishop, nor Priest, may give Licence to none, to do Lechery, *quia est Malum in Se*, by Law of Nature. But when that it is done, they may well enough assoyl it."

But, unless the Dispensation fall, plainly and naturally, within the Purview of some One of those Exceptions, no artificial Means can affect it. Those Exceptions it is as much beyond the Power of the Legislature to extend, as beyond that of the Executive to narrow. "If an Act of Parliament," said the illustrious Lord Chief Justice Vaughan (*h*), "call an Offence a Nuisance, from whence no particular Damage can arise to a particular Person, to have his Action, the King may dispense with such a nominal Nuisance." The particular Allusion of the Example does not appear to have been noticed by former Writers. "The Commons," says Hume (*i*), "in 1666, being resolved, contrary to the King's Judgment, to enact that iniquitous Law against Irish Cattle, found it necessary, in Order to obviate the Exercise of this Prerogative,—which they desired not, at that Time, entirely to deny or abrogate,—to call the Importation of that Cattle a Nuisance." This Act, so passed

(*h*) *Thomas v. Sorrel*, Vaugh. R. p. 335.

(*i*) *Hist. of James II.* Chap. I. Ann. 1687.

is the 18 Car. II. c. 2; and it appears to have remained in Force until 1825; when it was expressly repealed, by the 6 Geo. IV. c. 105, cl. 23.

Whether Charles ever used the Right, which the Law undoubtedly gave Him,—to deal with this Statute, in all Respects, as He might have done, had the colourable Words, importing Nuisance, not been inserted in it,—does not appear. He might have done so without Apprehension from the Commons. That was not a Law touching Religion, nor involving Sectarian Interests. Twice only, in all His Reign, had they remonstrated against the Use of the Dispensing Prerogative; and, on either Occasion, Charles had coupled it with His Ecclesiastical Supremacy, and had used both the One and the Other for the Protection of His Nonconformist Subjects, from the sanguinary Letter of Penal Statutes. But the Exercise of the Prerogative, when it touched not upon those Questions, gave little Umbrage to the House. In 1662, instead of dispensing with, He suspended the Execution of, a Law, which regulated Carriages. The Act of Navigation was a Measure of infinite Importance. Yet, during the Two Dutch Wars, He had Twice suspended that (*k*). It was so much more dangerous for Him, to tamper with the Jealousies and Prejudices of Party, than with the Sanctity of Law!

But it is not, upon Precedents taken from the Stuart Time, that this great constitutional Prerogative has to be established. There is not a Period of our History, in which its Footsteps do not appear. Never was there a Prerogative so well established, and so clearly defined, as that valuable Safeguard of the Liberties of the poorest Subject.

The 8 Richard II. c. 2, enacted, that no Man of Law should be, from thenceforward, Justice of Assise, or of

(*k*) Hume's History; *vbi supra*.

General Gaol Delivery in his own Country. By the 13 Henry IV. c. 2, this Statute was ordered to be holden and kept, notwithstanding any Statute or Ordinance made to the Contrary. But it was provided, that the confirming Statute should hold Place, and be in Force, so long as it should please the King, for Salvation of His Prerogative. In Consequence of this Proviso, it appears, the Act was seldom enforced, down to the Passing of the 33 Henry VIII. c. 24. That Act,—after reciting the Partiality of Judges, and other Mischiefs, thence arising,—for Reformation thereof, enacted, that no Justice, nor other Man learned in the Laws of this Réalm, should, at any Time from or after the First of Easter then next coming, use or exercise the Office of Justice of Assise, within any County where the said Justice was born, or did inhabit, upon Pain of c'. Penalty for every Offence of the Kind. No Reservation of the King's Prerogative is contained in this Statute. "Yet this, we know," as Lord Chief Baron Atkÿns, in 1689, himself confesses (*l*), "is frequently dispensed with, by a special Non Obstante ; so that these Statutes are seldom or never observed, and of little Use."

Such was the Practice at the Moment of the Revolution. Nor did any Alteration of it take Place upon that Event. By the Act of Henry the VIII., the Practice was undoubtedly illegal, without a proper Dispensation ;—yet it continued. Nor was it until the Passing of the 12 G. II. c. 27,—not without strong Opposition in the Commons—that the Statute Law of the Land was reduced Once more, into a Conformity with the long-established Practice.

The Truth is, that, while the very Designation of lawful Prerogative must always be the sufficient Limit of its

(*l*) Enquiry into the Power of Dispensing, &c. p. 13.



Action, it is, at the same Time, impossible, by any Wording of any Act of Parliament, further to restrain it.

The 31 Henr. VI. c. 5, which made it requisite to the Grant of a certain Office of Revenue, in the Gift of the Crown, that it should be done by Bill under Seal of the Treasurer, contained a Clause, making any other Mode of Grant simply and absolutely void. In the Reign of Elizabeth, it was nevertheless decided, that a good Grant of that Office might be made, otherwise than according to the Form of the Statute;—if the Case were a proper One for the Interference of the Crown by Prerogative (*m*).

So, too, by the 1 Henr. IV. c. 6, it is provided, that, in Petitions for Lands, Offices, Tenements, or other Profits, the Value of the Subject-matter shall be stated, and that, in Default of such Statement, the King's Letters Patent of Grant shall not be available, nor of no Force nor Effect, but wholly revoked, repealed, and annulled for ever. "Yet," says Sir Robert Atkyns again (*n*), "Letters Patent, to the contrary, are good, with a Non Obstante."

So, too, where it had been provided that (*o*), if, contrary to that Act, a Recusant should chance to be nominated to any of the Offices therein mentioned, the Nomination itself should be absolutely null and void,—it was, nevertheless, solemnly decided by the Court of Common Pleas, —and agreed to by all the other Judges, save One,—that it was an inseparable Prerogative in the Kings of England to dispense with penal Laws, and with that Statute of Charles amongst others,—not generally nor without Cause,—but in particular Cases,—and upon particular "necessary Reasons"—of which the King Himself was

(*m*) Lord Dyer's Rep. p. 303, *b*.

(*n*) Enquiry into the Power, &c. p. 13.

(*o*) 25 Car. II. c. 2.

sole Judge (*p*). It was afterwards remarked, by Lord Chief Baron Atkyns (*q*) that, supposing this Act had contained a Clause in it, declaring that all such Dispensations and Grants with Non Obstante should have been *ipso Facto* void, and had inflicted Penalties upon their Procurers, it could not have altered the Case. "The Judges," he says, "have resolved, that, if the King grant a Dispensation from such Laws, with a special Non Obstante of any such special Law, mentioning that very Law, that frequently the Force of that Law vanishes :"—so far, he should have added, as it affected to bind the lawful Prerogative, but not further nor otherwise.

The History of the Laws respecting Sheriffs furnishes some very curious Points illustrative of the foregoing Propositions.

By the 9 Edw. II. Stat. 2, it was provided, that Sheriffs should be placed, or appointed by the Chancellor, Treasurer, and Barons of the Exchequer, or, in the Chancellor's Absence,—by the Treasurer, Barons and Justices. The 14 Edw. III. Stat. 1, c. 7, after reciting the contrary Mischiefs resulting from the King's own Grants, enacted, that no Sheriff should abide in his Bailiwick beyond One Year; and that, then, some other fit Person should be ordained in his Room, by the Chancellor, Treasurer, and Chief Baron of Exchequer, taking unto them the Chief Justices of both Benches, if they were present; and that this should be done yearly, on the Morrow of All-Souls, at the Exchequer. The 28 Edw. III. c. 7, confirmed this Act as to the Disability of Sheriffs to abide in their Offices beyond One Year. The 42 Edw. III. c. 7. extended it to their Under-Sheriffs and

(*p*) Godden *v.* Hales, 2 Show. R. p. 475; XI. How. St. Tr. p. 1197.

(*q*) Enquiry into the Power, &c. p. 5.

Clerks. The 1 Rich. II. c. 11, made the Sheriff, who had served Once, ineligible for Three Years afterwards, if any one else were to be had. The 23 Hen. VI. c. 8, which recited those Statutes, and that they had been generally disregarded, to the great Mischief of the Realm, renewed and confirmed the same; and ordered, under heavy Penalties that they should be duly observed in every County of England; those only excepted, wherein the Lieges had, at that Time, an Estate of Inheritance or Freehold in the Office. Similar Exemptions were made,—in Favour of the City of London, by this Act,—and afterwards of the City of Bristol, by the 6 Hen. VIII. c. 18, specially enacted for that Purpose. It was then provided, that every Pardon or Remission, of Offences committed, or of Penalties incurred, in Respect of that Statute, or of the Statutes thereinbefore recited, should be “void and unavailing;” and all Patents made, or to be made, contrary to the same, should be “void and of no Value; any Clause or Word of *Non Obstante* in any [Wise] put, or to be put, in such Patents to be [so] made notwithstanding.” Twice, in the succeeding Reign, the Authority of that important Statute was by the 12 Edw. IV. c. 1, and the 17 Edw. VI. c. 6, recited, and acknowledged to be in Force. Lastly came the Act of Henry the Eighth, already referred to; in which express Mention is made of One of the former, and to the same Effect.

I have thought it advisable to recapitulate the various Provisions of these Statutes, in Order to show precisely what they were, and with what Stringency they sought to circumscribe the Royal Prerogative. Their Purview was Twofold. First, the Power of appointing Sheriffs, vested in the Crown, was to be exercised,—not immediately by the Monarch, but mediately,—by certain great Officers, and principal Members of the Judicature,—and not other-

wise. Secondly, the Appointment was to be annual, as well in Respect of the Patent issued, as of the Selection made; and, to give Effect to this last Enactment, the possible Exercise of Prerogative on the Part of the Crown, to interfere therewith, by Way of Dispensation or Non Obstante, was provided against, and declared from beforehand to be illegal and null. If, then, it were possible to confine lawful Prerogative, by Words in an Act of Parliament, this surely was that Case.

We find that, in the Beginning of Henry the Seventh's Reign, both these Points were distinctly raised before the Twelve Judges, and solemnly decided by them in Exchequer Chamber.

"It was shown for the King," says the Annalist of the Epoch (r) "how that King Edward the Fourth, by His Letters Patent, had ordained the Earl of Northumberland to be Sheriff of the same County, and had granted the Office of Sheriff of the County aforesaid, unto the said Earl, for Term of His Life, with all other the Offices thereunto belonging; yielding therefore yearly, unto the King, at His Exchequer Court, c<sup>l</sup>., without Account, and without other Rent, &c. Now—whether this Patent were good? And also, how this Patent shall be intended? And, as to the First Point, the Judges held the Patent good. For it is of such a Thing, as may well be granted, for Term of Life or Inheritance; seeing that divers Counties have Sheriffs by Inheritance, and that that did begin by Grant from the King. *Radcliff* showed the Statute of Anno 28 Edw. III. c. 7, and of Anno 42 Edw. III. c. 5. that no Sheriff shall be beyond One Year, &c.—albeit that there be a Non Obstante; and, this notwithstanding, that the King had all His said Prerogatives unto Him. So as, of the Value and the Certainty of Lands, and other Things, granted by

(r) Year Book, 2 H. VII. f. 6, b.

the King, and of shipped Wools, and of Charters of Murders, and many other Cases,—where the Statutes be, that Patents which do want these Things shall be void; still the King's Patents be good, with a Non Obstante. But, without Non Obstante, the Patents be void, by Cause of the Statutes. So, here, the Patent with a Non Obstante; Wherefore, &c."

Upon the Question of the Goodness of the Patent, the Judges were, for these Reasons, unanimous in rejecting the Claim put forward by Henry, and in declaring the Non Obstante of the former Sovereign lawful:—"for that," says Lord Coke (s), "the Act could not bar the King of the Service of His Subject, which the Law of Nature did give unto Him." Upon the Construction of the Patent,—which involved the other Question; viz. the Liability of the Sheriff to account for the Profits of his Office, they said they should reserve their Judgment; but showed themselves, upon the Whole, inclined to decide that Question too in his Favour.

What Reason of Necessity justified the Dispensation, or guided the Decision, of the Judges, in the last Case, does not appear from the compendious Report of it. Northumberland was not a County Palatine; neither had it Sheriffs at the Date of the Statute, who might have answered to the Reservation contained in it. North and South Tyndale, as you may remember, were altogether distinguishable from the "Guildable" County of Northumberland. That there must have been some especial Emergency, requiring such a Grant, and that it operated upon the Minds of the Twelve Judges,—it is, from the Nature of the Circumstances, impossible not to suppose. They could not have ventured to maintain such a Judgment, against

(s) Calvin's Case; 7 Rep. p. 14.

the Crown, unless upon the common Ground, on which, in Fact, every Exercise of the Prerogative is to be supported.

This Subject, of the Nomination of Sheriffs, affords a curious Illustration of the Truth of the last Proposition. In the Thirty-Fourth Year of Henry VI. ; and, therefore, subsequently to the Passing of the Statute of the same Reign,—the King attempted to substitute some other Person, more acceptable to Himself, in the Room of One, whom the great Officers, appointed by Law for assigning of Sheriffs, had chosen and presented to be the Sheriff of Lincolnshire. It would appear, that this Substitution was not called for by any Necessity, nor even recommended by any Prospect of greater Advantage to the Commonwealth. Such an Exercise of Prerogative would be clearly void. “Accordingly,” says Lord Coke (†), “it was resolved, by all the Judges of England, that the King did an Error, when he made another Person Sheriff of Lincolnshire, than was chosen and presented to Him by those Great Officers, after the Effect of the Statute.”

. But the Law is positively otherwise, where the Case, which presents itself, is One demanding the Exercise of Prerogative. Thus, in the Reign of Queen Elizabeth, while the Plague was raging in London,—insomuch that the Chancellor, Treasurer, Barons, and Justices, feared to meet in the Exchequer, as the Statutes required, for the purpose of choosing Sheriffs, and Term was held that Michaelmas at Hertford,—no Sheriff, according to Lord Dyer, was named by the Queen for the most Part, but One out of every Two of those Names, that remained in the Bill for the former Year. It was held that, notwithstanding the Statute of Edward the Second, already mentioned, the Queen, without any such Election, through Her Great Officers, might appoint a Sheriff, by Her Prerogative ;

(†) 2 Inst. p. 559.

using only the Words, "*Non Obstante aliquo Statuto in Contrarium,*" in the Patent (u).

In Fact, down to the Passing of the Act, commonly called Bill of Rights,—in itself a more startling Instance of Dispensation with Laws than the worst Abuse of *Non Obstante* ever was, or ever could have been,—the Laws relating to Sheriffs, and their Appointment, were continually dispensed with, as Occasion required. It is probable that the Practice ceased, after the Passing of the Bill of Rights, which affected to take away the Dispensing Power in all Cases;—just as many former Enactments had professed to do, in particular Cases,—and with as little Effect. But, if that were so, it must be remembered, that the Advocates of this new Learning had been exceeding hard pressed by Lord Chief Justice Herbert, on the Score of their former Inconsistency on this very Point. How, it had been asked, if other Dispensations were unlawful, could these be made good? How could they, who questioned the Prerogative, where its Exercise suited not the Objects of their respective Factions, admit it here without a Murmur? If James II. had been incompetent to permit His own Subject, Sir Edward Hale, to serve Him in a Colonelcy of Foot, without obliging him to swear to His Ecclesiastical Supremacy,—the Prerogative of *Non Obstante* was nowhere. Then, the solemn Judgments of so many Courts of Judicature were not to be relied on. Then, every Dispensation, which had been granted from the Beginning of the Monarchy, had been illegal, and its Consequences all vicious. Then, all Persons, convicted upon Indictments, which had been found by Grand Juries, returned by Sheriffs, whose Appointments were in any Way derived from the Prerogative, had been unlawfully attainted. Then, all Pannels of Juries returned, and all other Process executed, in civil Causes, by such

(u) Dyer's Reports, f. 225 B.

Sheriffs, were altogether erroneous. It was strange that Nobody, in so long a Time, should "have hit that Blot" (x).

The Partisans of the new Opinion could not disguise from themselves the Dilemma, to which these cogent and unanswerable Propositions reduced them. A Clause in the Bill of Rights had to be framed to meet the Difficulty of their Case! Yet the Difficulty cannot be said to have been met by that. It only enacted, that "no Charter, or Grant, or Pardon, granted before the Three-and-Twentieth Day of October, A.D. 1689, should be any Ways impeached or invalidated by that Act, but that the same should be, and remain, of the same Force and Effect in Law, *and no other*, than as if that Act had never been made" (y). If then they were illegal before the Act, they remained so after it passed. Yet no attempt was ever made to impeach their Validity. The Proceedings of the exiled King had been odious rather to Party than to Law!

The general Ground, upon which the foregoing Decisions proceeded, was well and clearly laid down in the following Case, reported by Lord Coke:—

The illiberal Jealousy of the Commons, in the Reign of Henry the Fourth, had occasioned the Passing of no less than Nine Acts of Parliament in One Year, against the Right of Welshmen to participate in Liberties, common to all other the King's Lieges. They were disarmed,—forbidden to meet without Licence from Ministers,—and disabled to sit as Jurors, on the Trial of any Culprit, within Wales, who happened to be an Englishman. It was then enacted (z), that no Welshman be made Justice, Chamber-

(x) Sir Edward Herbert's "Short Account of the Authorities in Law, &c." *apud* XI. Howell's St. Tr. p. 1258.

(y) 1 W. & M. c. 2, s. 13.

(z) Statutes of the Realm, 4 Hen. IV. c. 32.



lain, Chancellor, Treasurer, Sheriff, Steward, Constable of Castle, Receiver, Escheatour, Coroner, nor Chief Forester, or other Officer, nor Keeper of the Records, nor Lieutenant, in any of the said Offices, in no Part of Wales, nor of the Council of any English Lord; "notwithstanding any Patent made to the Contrary, with this Clause, Non Obstante quòd sit Wallicus natus." Those Acts were not repealed until the 21 Jac. I. c. 28. Yet, in the preceding Reign, and while all of them were still in Force, we find Lord Coke, commenting upon the Words of the Act last cited, and declaring that (a), "yet, without Question, the King may grant this, with a Non Obstante." He then enumerates other Cases, wherein the same Law had been laid down by other Judges, and notes "a good Diversity, when the King shall be bound by Act of Parliament, so that He cannot dispense with it," in that Manner. "No Act," his Lordship observes, "can bind the King from any Prerogative, which is sole and inseparable to His Person:—as a Sovereign Power to command any of His Subjects, to serve Him, for the Public Weal. And this, solely and inseparably, is annexed to His Person. And this Royal Power cannot be restrained by any Act of Parliament,—neither *in Thesi* nor *in Hypothesi*,—but that the King, by His Royal Prerogative, may dispense with it. For, upon Commandment of the King, and Obedience of the Subject, doth His Government consist. But, in Things which are not incident, solely and inseparably, to the Person of the King, but belong to every Subject, and may be severed,—there an Act of Parliament may absolutely bind the King. As if an Act of Parliament do disable any Subjects of the King to take any Land of His Grant, or any of His Subjects, (as Bishops, as it is done by the Statute 1 Jac. I. c. 3,) to grant to the King; this is

(a) Case of Non Obstante, 12 Rep. p. 19.

good. For, to grant or take Lands or Tenements is common to every Subject, and for this it is not *proprium*, *quarto Modo*, to Kings,—*scilicet omni, solo, et semper.*”

It has been absurdly objected to this valuable Prerogative, that it was invented,—(as if it were possible to invent that which is inherent in, and inseparable from, every Government!) and First used in the Court of Rome (*b*). King John,—or Henry the Third, says another Authority,—improving upon the First (*c*),—borrowed from that Court the Dispensing Prerogative; or at least, learned how to apply it for the Avoidance of Acts of Parliament! No doubt, there were no earlier Dispensations with Acts of Parliament. Charters, and Statutes, and Decrees, were, as we have seen, always the Subject of Revision and Relaxation before the Royal Judgment Seat. But Acts of Parliament, properly so called, were of more modern Origin. Before these themselves existed, they could not become the Subject of Dispensation; nor is it possible to conceive the Passing of Acts of Parliament, before Parliament was in Existence to pass them.

That the Rules and Limitations, by which the Exercise of this Prerogative was determined, came of the same Origin with many other Portions of our Common Law, is indeed highly probable. I have elsewhere remarked upon the Closeness of the early Connection, between the Canons of the Church and the Laws of the Commonwealth. In the History of that Connection, and in the Blessings that were thence derived to England, there is nothing, that should make us ashamed of the Origin, which Parliamentary Theorists assign to this Prerogative. But they produce no Evidence in Support of their Assertion. It is true, that, in the Reign of Henry the Third, whilst Litiga-

(*b*) Dav. Rep. fol. 69 *b*.

(*c*) Atkyns' Enquiry, &c. *ubi supra*.

tion with Rome, touching Provisions to Benefices, was at its Height, and both Parties were equally intent upon pursuing their Advantages, great Complaint was made, in One Quarter, of the indiscreet Use which Innocent IV. was alleged to have made of the Non Obstante Clause; or, to speak more correctly, of His angry and indiscriminate Revocations of former Grants, made by Himself or His Predecessors; and which, according to the Canon Law, were revocable at Pleasure. Still, it was not His general Right that was denied, but His alleged Misuse of it, that was exclaimed against. It was not the mere Addition of Non Obstante, but its "Multiplex Adventus"—its too frequent and inconsiderate Introduction into Documents,—that made it so displeasing to the People. In like Manner, when, upon several Occasions, Henry the Third sought to annul His own most righteous and reasonable Obligations, by a Non Obstante, the Indignation was general, which this Abuse of Prerogative excited, and He was compelled to abandon the Attempt. But, again, in His Case, as in that of the Pope, it is plain, from the Language of every Historian of the Epoch, that it was against the Abuse alone, and not against the Prerogative, that the Ill-will of the Malcontents was directed (c).

Sensible of the Futility of that Objection, those, who, at the present Day, affect to call in Question this indefeasible Prerogative, do so, upon the scarcely less shallow Ground, of the Possibility of its sometimes being drawn into Abuse. Consider, they say,—the Consequences. If One Act may be dispensed with, now and then, why not the whole Statute-Book, and for all Purposes? Magna Carta and Habeas Corpus will be but idle Words, when that Calamity befalls

(c) See the Passages in Atkyns, *ubi supra*; and also in Attwood's Prynne's, Petyt's, and Luder's Treatises, on the same Side, of the Question.

England! Then the Power of the Crown will be everything, and that of Law nothing. Who shall pretend to determine a Limit to this capricious Rule, for interpreting the Meaning and Obligation of Statutes? Equity is a wide Term, of a vague and dangerous Import. It was in the Name of Equity, that the Star Chamber and High Commission Courts of Old were established; and doubtless those who sat there had, in Fact, an Equity to guide them: but it was not the Equity which the Subject loved, nor the Laws acknowledged. How much safer to stand upon the worst of Laws than upon the wisest Equity! The former change not,—the latter varies with the Men who administer it. The Subject possesses in the former a clear Direction. But the Attempt to follow, much more to anticipate, the Fluctuations of the latter, can only end, by plunging him more deeply than ever into the Mazes and Quagmires of Uncertainty.

For these Reasons, say they, the Doctrine of Non Obstante is essentially and fundamentally erroneous. Were it established by an express Law, it would, of Necessity, have to be put aside and nullified in the Practice. How great, therefore, is their Absurdity, who contend, in Defiance of the Statute of William and Mary, that the Doctrine is a legal and constitutional One,—that it is of its very Nature indestructible,—and that the Statute in Question is void against it!

These Objections are more fallacious than plausible. The Argument, which proceeds from the Abuse to the Use of any Institution, is unreasonable and unfair;—and, if carried out, would go far to impeach Society itself, and the Religion which keeps it together. The best of Laws are liable to Perversion. It is the Part of the Lawgiver to devise Means for detecting it, and bringing it to Justice. This is within his Competence;—this is his Duty;—to perform.

But, to prevent the Appearance of such—so long as the Nature of Man subsists—were an idle and Utopian Endeavour.

Now, this Prerogative of Dispensation, judiciously wielded, is, of all Others, the most secure against the Possibility of Misdirection or Perversion. "*Talia non procedunt, nisi ex magnâ et satis necessariâ Causâ*" (d). To ascertain the Lawfulness of the Necessity, the strictest Conditions are demanded. It must be tried, say the Civilians, whether the Necessity may not be avoided by some lesser Expedients. Nor is the Necessity lawful, where the other Side is pressed with an equal Want! And, lastly, an assured Restitution in Kind, or Compensation in Value, where Detriment to Persons or Property shall have resulted from the Exercise of that Prerogative, must be made by the Commonwealth (e).

It is vested, not in the Three Estates, but in their Sovereign; and, it being One of Her Judicial Attributes,—the Sovereign exercises it, by and with the Advice of the Lords of the Privy Council, sitting in their Corporate Capacity, and as a Tribunal of Sovereign and Public Justice. The Minutes of what is done there are carefully recorded. The Subscriptions to those Minutes identify the Councillors, who advise the Adoption of the Measure;—and, therewithal, there is imposed upon every Man of them a real Responsibility for the same. As for other Matters, entrusted by the Constitution to that Council of State,—so for this, it is not enough for the individual Councillor to show, that he has acted within the Scope of his Functions. It remains to establish the Soundness, and the Wisdom, and the Righteousness, of his Acts and Advices, and to answer for these with his Head! Nor, while Parliament continued

(d) Ulpian. L. Si alius D. quod vi aut clam.

(e) Less. Lib. 2, Cap. 12; Dub. 12, Nu. 70; Adrian. quod lib. Art. 2, Cap. 3; Grotius de Jure Belli et Pacis, Lib. 2, Cap. 2.

to control, and had not begun to initiate, and the Confusion of Powers and Duties were as yet far distant—were there wanting those, who exacted from the Privy Councillor the full Measure of his Responsibility. These, it must be confessed, were formidable Bars to the Indulgence of Royal Caprice, in the Dispensation with good Laws, however complaisant might be the Councillors. The Danger of such was not to be apprehended, unless upon Grounds, which would also justify the Apprehension of an Universal Overthrow of Justice and Right, in the Administration of the ordinary, as well as the extraordinary, Prerogatives of Government.

Moreover, if the Argument be not utterly worthless, it must be taken to extend to every Qualification of the severe Letter of Written Law, no Matter by whom attempted. The Lawyer and the Antiquary will be struck with the entire Identity of some Parts of it with that celebrated Accusation, which Coke, Owen, and other Champions of strict Law in their Day, levelled against the antient and undoubted Prerogative, in Matters of private and public Justice, which is still exercised by the Court of Chancery. Even the benign and liberal Interpretation of some Statutes,—the jealous and enforced Restrictions upon others,—the Declarations of Approval or Disapproval, founded upon alleged Grounds of Equity, and even of Policy,—and all those Contrivances, known to the Courts of Common Law, for evading the unjust and unwise Expedients of hasty, temporary, and occasional Legislation,—are,—almost equally with their Prototypes of the Equity Courts,—open to this Cavil, upon which the Royal Prerogative of Non Obstante stands impeached. Much more open to the same, is that undoubted Attribute, inherent in every Judiciary,—and, in an especial Manner, as was shown in my last Lecture, recognised and established by our own Law—of declaring, in

a careful and solemn Manner, to the People over whom they are placed, the Nullity of Customs, of Bye-Laws, yea, and of Acts of Parliament,—where the Constitution of the Realm, the Law of Nature, or of Nations, the Dictates of Reason, Morality, or the Revealed Will of the Almighty, are by such Acts, such Bye-Laws, or such Customs, contradicted, violated, or set at Nought.

I will not say that the Law of England,—which vested in the Judges the Exercise of that undoubted Prerogative of the Sovereign Power, of declaring the Nullity of pretended Laws, and unjust Enactments,—was derived from the Laws of the Empire. But, certainly, the Coincidence is remarkable. And we should remember, that, for about 360 Years, the *Lex Prætoria*,—as Part of the general Body of Roman Law,—was, undoubtedly, supreme within the Diocess of Britain.

The Prætors, says Dr. Burn (*f*), were expressly said, not to have the Power of abrogating the whole Law, but merely of assisting, supplying, and correcting it. *Jus Prætorium est, quod Prætores introducunt, adjuvandi, vel supplendi, vel corrigendi, Juris civilis Gratia, propter Utilitatem publicam.* Dig. 1. 1. 7. And we find the Prætor denying an Action in a certain Case, *ne contra Leges faciat.* Dig. 6. 2. 12. sec. 4. Yet, in Fact, the Decisions of the Prætorian Law were, in some Cases, directly contrary to the Twelve Tables. But those were Cases, where Equity required their Interference, against the strict Letter of the Law. They perfected this System of Equity chiefly by Four Means:—1. By inventing Fictions, as that of the *Jus Postliminii*, by which a Person, who returned from Captivity, was, in order to preserve his civil Rights, feigned never to have been absent. 2. By introducing Persons and Names unknown to the old Law. Thus, when they wished to give the Pos-

(*f*) *Eccles. Law*, Vol. I. Preface, pp. xv—xvi. (8th Edit.)

session of a deceased Person's Property to One who was excluded from the Inheritance, they called him *bonorum Possessor*, though, in Fact, he differed little from an Heir. 3. They defeated many Actions, valid by the civil Law, by granting Exceptions against them, if the Transactions on which they were founded were brought about by Fraud or Fear ; and, in some Cases, they granted Actions which the Civil Law denied. 4. By a Sentence, called *Restitutio in integrum*, they restored the whole Business to its former State, as if Nothing had been done. (See *Heineccii, Antiq. Rome, Lib. 1, Tit. 2.*) The *Prætors*, as, indeed, all other Magistrates, were attended by a numerous Council of Assessors when they sat in Judgment ; (*Noodt. de Jurisdictione, Lib. 1, Cap. 11 & 12,*) and their Jurisdiction was much more extensive than that of the *Ædiles*. The Fragments of the Perpetual Edict are collected by *Jacobus Gothofredus*, and are also published by *M. Pothier*.

The Innovations of the learned Lawyers and the *Prætors* will not surprise those, who reflect on the jarring Powers which composed the Roman State, which made it more difficult to procure new Laws, to be enacted by public Authority, to meet new Emergencies, than it is with us to procure an Act of Parliament. And, in Truth, something of a similar Nature has happened in the Laws of all Nations, among ourselves. *Plowden, p. 119,* says, "The Judges have frequently explained the Words (of an Act of Parliament) entirely contrary to the Text, and sometimes have taken Things by Equity, contrary to the Text, in order to make them agree with Reason and Equity." *Lord Hobart, too, p. 364,* has the following Passage: "If you ask me, then, by what Rule the Judges guided themselves, in this diverse Exposition of the selfsame Word and Sentence? I answer, it was by that Liberty and Authority, that Judges have over Laws,—especially over Statute Laws,—



according to Reason and best Convenience, to mould them to the truest and best Use." To our Judges we owe the Barring of Estates Tail, by the Fiction of a Recovery, and the modern Equitable Process in Ejectment. Serjeant Moore invented the Conveyance, by Lease and Release, to supply the Necessity of Livery of Seisin. The Ecclesiastics introduced the Doctrine of Trusts, to evade the Statute of Mortmain ; and many other similar Instances might be adduced.

Those were Instances of Enactments, simply unjust, and, therefore, void. But, there is another Class of void Enactments, where the Invalidity is in Respect, not of their intrinsic Injustice, but of their Defect of Jurisdiction. It is under this Head, that those Acts of Parliament are to be classed, which are avoided by the Law of Nations. The Laws on this Subject are, of Course, very antient ;—as old as the Community they govern.

In the Reign of James I. we find it stated, that (g) "the Law Merchant is the Law of Nations ; and, of every Realm, Mercatura, sive Societas Mercatorum, est magna Republica, as Ulpian saith. For, of this Common Weal, all Nations do participate. For it is impossible, that the Municipal Laws of any Realm shall be sufficient, for the Ordering of the Affairs and Traffic of the Merchants. And, for this, the Generality of that Law hath obtained the Name of the Law Merchant, in our Books ; and of that Law are divers positive and general Rules."

In a Case in the Star Chamber (h), "it was moved by some, unto the Chancellor, that that Matter ought to be determined at the Common Law, and not here." *The Chancellor*,—"This Suit is taken for a Merchant Alien, who is come, by safe Conduct, hither ; and he is not held to sue,

(g) *The King v. Cusacke*, 2 Roll. R. pp. 113—14.

(h) P. 13 Edw. IV. fo. 9 (pl. 5.)

according to the Law of the Land, to tarry the Trial of xij. Men, and other Solemnities of the Law of the Land; but he ought to sue here. And, it shall be determined, according to the Law of Nature, in the Chancery; and he ought to sue there, from Hour to Hour, and from Day [to Day], for the Speed of the Merchants, &c. And he said, moreover, that Merchants, &c. should not be bound by our Statutes, where the Statutes are *introductiva novæ Legis*, but they are *declarativa antiqui Juris*; that is to wit, Nature, &c. And, albeit they become within the Realm, therefore the King hath Jurisdiction of them, to put to stand, to Right, &c., but that shall be *secundum Legem Naturæ*, which is called, by some, Law Marchant; which is Law universal for all the World. And he said, that it hath been adjudged, that, notwithstanding the Statute which willeth that Safe Conduct be enrolled, and the Number of the Mariners, and the Name of the Vessel, &c. that when Alien hath Safe Conduct, and hath not the said Circumstances therein, and, nevertheless, it was allowed. For, the Aliens said, that they are not held to know our Statutes; and they came by Cause of the King's Seal, that is, to wit, His Conduct; and, even if it shall not be sufficient, therefore it shall be received, &c."

In the Case of an American Ship, captured under the Orders in Council of the 26th of April, 1809, for Breach of Blockade, the Confiscation was resisted on the Grounds, First, that the Orders, although not revoked, had become virtually extinct; and, Secondly, that, at all Events, they were made void, as against the Parties before the Court, by Reason of the Equity of their Case. In the Course of the Discussion, a Question was started, What would be the Duty of the Court, under Orders in Council, that were repugnant to the Law of Nations? In observing on this Point, Lord Stowell said (i), that "the Court was bound to admi-

(i) "The Fox;" Edw. Adm. Rep. pp. 312—13.

nister the Law of Nations to the Subjects of other Countries, in the different Relations in which they might be placed, towards this Country and Her Government. This is what other Countries have a Right to demand for their Subjects, and to complain if they receive it not. This is its unwritten Law, evidenced in the Course of its Decisions, and collected from the common Usage of Civilised States. It is strictly true, that, by the Constitution of this Country, the King in Council possesses Legislative Rights over this Court, and has Power to issue Orders and Instructions, which it is to obey and enforce; and these constitute the Written Law of this Court. The Constitution of this Court, relatively to the Legislative Power of the King, is analogous to that of the Courts of Common Law, relatively to that of the Parliament of this Kingdom. Those Courts have their Unwritten Law,—the approved Principles of Natural Reason and Justice. They have likewise their Written or Statute Law, in Acts of Parliament, which are directory Applications of the same Principles to particular Subjects, or positive Regulations consistent with them, upon Matters which would remain too much at large, if they were left to the imperfect Information, which the Courts could extract from mere general Speculation. These Two Propositions, that the Court is bound to administer the Law of Nations, and that it is bound to enforce the King's Orders in Councils, are not at all inconsistent with each other; because these Orders and Instructions are presumed to conform themselves, under the given Circumstances, to its Unwritten Law. They are either directory Applications of those Principles, to the Cases indicated in them, or positive Regulations, consistent with those Principles;—applying to Matters, which require more exact and definite Rules, than those general Principles are capable of furnishing.

“What would be the Duty of the Individuals, who pre-  
side in the Courts of Common Law, if required to enforce  
an Act of Parliament which contradicted those Principles,  
is a Question which, I presume, they would not entertain,  
*à Priori*, because they will not entertain, *à Priori*, the Sup-  
position that any such will arise. In like Manner, this  
Court will not let itself loose into Speculations, as to what  
would be its Duty, under such an Emergency, because it  
cannot, without extreme Indecency, presume that any such  
Emergency will arise.

“In the particular Case of the Orders and Instructions,  
which give Rise to the present Question. . . . I have no  
Hesitation in saying, that they would cease to be just if  
they ceased to be retaliatory; and they would cease to be  
retaliatory, from the Moment the Enemy retracts, in a  
sincere Manner, those Measures of his, which they were  
intended to retaliate.”

There is another and a more forcible Example. The  
Slave Trade has been forbidden to British Subjects, both  
by Act of Parliament and by Order of the Council. In the  
Convention with France on the same Subject, it was so-  
lemnly asserted, that it had also been forbidden in France;—  
of which latter Point, however, there appeared to be some  
Doubt. But that, in this Country, and to the Subjects of  
this Country every where, it was made a Crime by Statute,  
and, as such, forbidden, under Pain of Transportation, there  
was no Dispute. A French Ship, upon the Western Coast  
of Africa, admitted to have been then engaged in the Slave  
Trade, was, after a severe Engagement, in which many Lives  
were lost, captured by a British Vessel of War, and, after  
Search, brought into Sierra Leone; where she was con-  
demned in the Vice-Admiralty Court as a Slaver. The  
Owners appealed to the High Court of Admiralty;—and  
Lord Stowell, after hearing the elaborate Arguments of

both Sides, pronounced for the Owners;—in One of the most learned and masterly among his many unrivalled Judgments; and he reversed the Sentence of the Vice-Admiralty Court. Assuming that the Traffic was unlawful in France,—as it undoubtedly was in England,—his Lordship held, that it was utterly incompetent for the British Courts of Justice, to assume,—or the British Legislature to confer,—the Right of enforcing the Laws of France against the Traffic, without an express Treaty with France, investing those Courts or that Legislature with the Jurisdiction. He therefore declared the Act of Parliament null and void, against Foreigners, by the Law of Nations;—because no Act of Parliament could affect any Right or Interest whatsoever, by Regulations which were inconsistent with that great natural Law. The Necessity of the Measure to the due Accomplishment of a Purpose of so much Humanity and Justice, as the Abolition of the Traffic was believed to be, could not make that Measure lawful.

“The Difficulty of the Attainment,” his Lordship observed, “will not legalise Measures that are otherwise illegal. *To press forward to a great Principle, by breaking through every other great Principle, that stands in the Way of its Establishment,—to force the Way to the Liberation of Africa, by trampling on the Independence of other States,*—in short, to procure an eminent Good, by Means that are unlawful,—is as little consonant to private Morality as to public Justice. A Nation is not justified, in assuming Rights that do not belong to her, merely because she means to apply them to a laudable Purpose” (i).

“The Court of Parliament,” it was said by the Justices in another antient Case of great Authority (j), “may be misinformed, as well as other Courts. And, when they have recited a Thing which is not true, it cannot be otherwise

(i) *The Le Louis*, 2 Dods. Ad. R. 256—7.

(j) *Lord Leicester's Case*, Plowd. R. p. 398.

taken, but that they were misinformed. For none can imagine, that they would purposely recite a false Thing to be true. For it is a Court of the greatest Honour and Justice; of which none can imagine a dishonourable Thing. And, forasmuch as the Legislature always have Justice, and Truth, before their Eyes,—and their false Recitals—(if there are any)—are made upon false Information,—from thence it follows, that they do not intend any One to be concluded by such Recitals grounded upon Falsehood. For he, that says to the Contrary, affirms that their Intent is to oppress Men wrongfully, which is indecent to be said of them. And he, who insists that some shall be concluded by such Falsehood, impugns the Intent of the Makers of the Act, and, in that, the Act itself. For the Act is nothing else but the Intention of the Makers of it.”

The King is the Great Conservator of the State, and the Head of the Law; and, therefore, it is said that He can do no Wrong. For Wrong is Dishonour to the Law and Ruin to the State. It is for that Reason, that even the Acts of the King in Parliament are of Effect, only while they remain within the strict Limits of Law and Justice, and that they are made null by the mere Effort to exceed them.

“An Act of Parliament,” says Lord Coke, “never does a Wrong.”—“An Act of Parliament to which the Queen and all Her Subjects are Parties, and give Consent, cannot do a Wrong.” Thus, where by no Construction whatsoever, except in Contradiction to the Letter of a penal Act, any other Effect can be given to such Act, than One, which operates “condemnare Insontem et dimittere Reum,” there is an express Authority for saying, that the Courts of Law would hold that Act of Parliament to be against Law and Reason, and therefore void (*j*).

“I do not,” it was said by the great Lord Wynford, with

(*j*) Margaret Podger's Case, 9 Co. 106, *b*, 107, *a*; Lord Cromwell's Case, 4 Co. 13, *a*.

Reference to Two Acts of Parliament, upon which the Legality of a certain Traffic was said to rest,—“ I do not feel myself fettered, by any Thing expressed in either of them, in pronouncing the same Opinion, upon the Rights growing out of it, as if they had never passed. If, indeed, there had been any express Law, commanding us to recognise those Rights, we might then have been called upon, to consider the Propriety of that, which has been said by the great Commentator upon the Laws of this Country, that, if any human Law should allow, or enjoin, us to commit an Offence against the Divine Law, we are bound to transgress that human Law (*k*). It is a Relation, which has always, in British Courts, been held inconsistent with the Constitution of the Country. It is a Matter of Pride to me, to recollect that, while Economists and Politicians were recommending to the Legislature the Protection of this Traffic, and Senators were framing Statutes for its Promotion, and declaring it a Benefit to the Country,—the Judges of the Land,—above the Age in which they lived, standing upon the high Ground of Natural Right, and disdaining to bend to the lower Doctrine of Expediency—declared that it was inconsistent with the Genius of the English Constitution. As a Lawyer, I speak of that early Determination, when a different Doctrine was prevailing in the Senate, with a considerable Degree of professional Pride” (*l*).

Those were vain Titles, or else the Pretensions of modern Parliaments are unfounded. If an Act of Parliament be of that transcendent Character, which, after Hobbes, the Doctrinaires of the present Day are accustomed to attribute to it, how shall the Judges of the Land deny, or question, its Supremacy? If, however, there be this Function in the Judiciary—who are but the Representatives and Delegates

(*k*) I. Bl. Comm. p. 12.

(*l*) *Forbes v. Cochrane*, 2 B. and Cr. pp. 469—470.

of their Sovereign, the *Parens Patriæ*, in Whom the general Administration of Law and Justice is resident—what becomes of that pretended Omnipotence of Parliament, to bind and fetter the Sovereign Herself, even to the Prejudice of the Commonwealth?

Struck with this Difficulty, the more zealous Partisans of the Parliamentary Majorities in both Houses have, in latter Times, ventured to dogmatise against the solemn Positions last cited, and, in the Face of the whole Current of Authority, to deny to the Judges of the Land, the inherent Attribute of every Judiciary. They deny their Right of Guardianship over the Rights and Franchises of the feeblest,—or, at least, their Right to exercise it, by annulling the Usurpation,—howsoever clad with Vestures and Forms of Law,—which the Ambition or Hatred of the Strong shall succeed in devising against them. To such Men what Reply is possible? “They have Moses and the Prophets;—let them hear them!” They have the solemn Judgments of the Law itself, speaking from its appointed Place, by the Mouths of its Ministers. High and noble were the Words of Lord Wynford. Yet he had no other Merit than that he was bold and honest enough to give them Utterance. They were not his own. They had been spoken long ago in the same venerable Hall, and by many a former Occupant of the same majestic Judgment Seat. Blackstone himself, the courtly and Erastian Commentator,—living so near the Epoch, and so deeply imbued with the Notions, and so submissive to the Influences, of the Revolution of 1688,—was neither able nor hardy enough to refuse to the Truth an apparent Recognition; faint and insidious as was the Language which conveyed it. It was reserved for the “*Nos Nequiores*” of these latter Times to complete the Work. There are Sceptics who disgrace the Name of Lawyers, by making Market of their Duties.



These now affect the unanimous Opinion, ~~that~~ the Law,—which Coke, and Hale, and Holt, and Mansfield followed,—which even Blackstone asserted,—and which has been eloquently and manfully vindicated, within their own Recollection, from the same Bench, by One, who united to the Office of Judge of the Highest Court of Judicature, that of Member of the Legislative Body, whose pretended Omnipotence they demanded to have established,—that this indisputable and essential Law, in common with many another Time-honoured and Fundamental Bulwark of personal Freedom, has, by some Means,—what they deign not to inform us,—become effete and obsolete! From the superficial Insolence that could hazard such assertions, the Law disdains to be defended. They cannot make it void, nor stay its inevitable Course ;

“ L’Astre, poursuivant sa Carrière,  
Verse de Torrents de Lumière  
Sur ses obscurs Blasphémateurs !”

and our only Regret must be, that Objects so unworthy should be suffered to share in its Blessings.

There are others, who pretend to steer a midway Course, between Law on the One Side, and Parliament on the Other. According to this *Juste-Milieu* School, headed by Locke, the Parliament is, not an omnipotent, but a limited Court,—having defined Functions, and bound to exercise these for the common Good, upon Pain of Nullity. They confess that it is Law, that it would not be within the Scope of the Parliamentary Delegation, for Parliament alone to change the Religion of the Country,—to transfer its own Functions to a foreign or independent Legislature,—to depose the reigning Queen, and to establish a new Dynasty,—or even to make Laws which would so bind the Subject, as to restrain or take away his Natural, Constitutional, or other Indefeasible Rights ; for Example, the Right of Petition. All these, and such as these, they confess to be Matters,

beyond the Competence of Parliament to deal withal ; and the Attempt to deal with them, however it might succeed in procuring the Sanctions of Form, and the Ensings of Legislative Authority, would be, after all, a Nullity. · It may be made an "Act of Parliament." For, to that End, the Assent of the Monarch, and of Her Estates of Parliament, are all that is necessary. But it is an Act of Parliament that can never be "passed into a Law."

"Neither Lords, nor Commons, nor King, no, nor the whole Legislature together, are to be considered as possessing the Power to enslave the People of this Country." Those were once the Words of a distinguished Oracle of the Sect. Those were Fox's Words, as used in the House of Commons. They were meant to denote his Sense of the intrinsic Nullity of the Treason and Sedition Acts ; which Measures the Majority was at that Time engaged in passing. How did the great Partisan of the Doctrine of 1688 reconcile his Words with his Opinions ? How award to Parliament the absolute Dominion over Law, and yet deny it the Power to oppress ? If, indeed, to the English Judicature,—as to its American Offspring—as to the Judicature indeed of every free Community upon Earth;—the Constitution had confided the Function, of dealing with the Acts of the Parliament, as with those of every other Municipality Court or Council in the Realm,—if the Judges possessed the Right, and therefore the Duty, to investigate, what was the Measure of the Conformity of those Acts to the Constitution under which that Parliament lived and had its Being—then, indeed, there was nothing in the Language of the great Whig Leader, which the soundest Lawyer and Patriot would not hear, approve, and own. But that was a Sense, foreign alike to the Man who uttered the Words, and to the Assembly he addressed.

That there might be no Doubt as to his Meaning, he proceeded to say, that the only Limitation, by which, in

his Judgment, the Authority of the Legislature was confined, was the Hazard of Insurrection. That there might be no Doubt as to the Meaning of his Faction, he enumerated some of their greatest Authorities living and dead, and referred to them the Parentage of the Doctrine. And, lastly, that there might be no Doubt as to the perfect Identity of the Disregard, which he and his Faction, in common with their Adversaries, entertained for the Authority of Courts of Law,—to control the Oppressions of the Legislature,—he reminded his Hearers, that, what they all admired in their Heroes of the Revolution, was, not their Adhesion to Law, but their successful Endeavour to overturn it..

“ I repeat,” he said, “that they may—separately or united—do such Acts, as may justify Resistance from the People. Is this Doctrine false? Is it necessary to urge any Argument to support its Truth? It is a Doctrine I learned from earliest Youth. I learned it from Locke, from Sydney, from the late Sir George Savile, from the Earl of Chatham, and from almost every great and venerable Authority, that the Annals of this Country can boast. I believe that every Man, who really values the Principles of our Constitution, entertains the same Sentiment;—and this has been eloquently expressed, in a celebrated Sermon, by a Reverend Prelate, the present Bishop of Llandaff. I do not believe there is One, amongst the most base, contemptible, and servile of Mankind, who is yet prepared to state, that the People can, in no Case, be justified in Resistance, even to the whole Legislature.

“ I will say, therefore, Once more, that, if such Means are persisted in, against the decided Voice of the Majority of the People (!), the Question of *Resistance* must ultimately be, not a Question of *Moral Duty*, but of *Prudence*, I will not say of *Morality*, or of *Prudence*, but of

*Justice* also (!). If, therefore, the People of England should be so unwise as to commit Acts of Resistance, *Ministers* may condemn them, *Parliament* may condemn them, the *Laws* (!) may condemn them, *Prudence* (!) may condemn them. But, I believe, no good Man can accuse them of—*Moral Guilt* (!).

“Why do we admire the great Characters of Russell and Sydney? Was it because they were unjustly condemned? Certainly they were unjustly condemned;—for they were condemned illegally, on defective Evidence, and against Law. But, although they were *thus* condemned, is there a Man, this Day, who has read their History, who does not believe they had in Contemplation a Resistance to the Prince then upon the Throne? Why do we admire them, then? The *simple Injustice* of their Execution could have reflected Disgrace only on their Accusers and Judges. No. It was because they *had* that Resistance in Contemplation;—that they *were* determined to resist *Principles* which then prevailed—*Principles* which were odious to the People (!) of this Country; *Principles* much too nearly resembling some modern *Doctrines* among ourselves. They found *the Law* insufficient; and they endeavoured to bring about a Revolution favourable to the *Liberties and Rights* of Englishmen; and, if this be the Case at present, the Question becomes still nothing, but a Question of the Application of the same Principle (!!!). These are the Reasons why *we* admire the Characters of these great Men;—and admired they will be, while a spark of Liberty animates the Bosom of an Englishman (*m*)!”

If the Authority of the Law were adverse to the Authority of its Ministers, it is plain, that the Partisans of those melancholy *Doctrines* would be the foremost in supporting

(*m*) Speech in the Debate on the Treason and Sedition Bills; 3rd December, 1795.

the latter. Were the Judicature to descend, from the high Ground of Right, to the low Footing of Faction,—exercising its Trusts indeed, but justifying that Exercise only as a Measure of Resistance to legitimate Authority, and as made necessary by a pretended Insufficiency of Law,—then would Parliamentary Faction be as forward in applauding and inviting such Interference, as now they are in deprecating it. The very Qualities which make it what it is, the best remaining Bulwark of our Liberties, attract their Jealousy and Alarm. They see, that it is not the mere Creature of a rare Occasion, brought suddenly into a brief and unlawful Existence, and expiring with its Parent. They behold in it something more formidable than the mere Ebullition of the passing Discontent or Fury of a Populace. It is not Rebellion, but Law,—permanent, present, and constitutional Law,—ready to listen,—ready to condemn,—and as terrible to Faction as to Tyranny. Accordingly, they will none of it. They feel a common Interest in opposing it. They unite their Efforts and Influence with the Corruption of the Treasury, that they may persuade the People that it is no more, and to forget its Memory. It is much better, they would have you think, to rebel against Law, while Tyranny oppresses, than to punish the Tyranny by the Hands of the Law. It may not be “prudent.” But it must be “just.” It may not be “moral,” nor “duteous.” But no “good” Man can condemn it. Laws, indeed, are broken, and Allegiance forfeited, by the private Act of the Subject ; what Time he becomes a Rebel. But what of that ? Triumphant, the Law can harm him not. Crushed and chastised, he has at least the Consolation of knowing, that he suffers for the Liberty of his Countrymen,—as taught and understood in the School of 1688 ;—a Liberty, namely, of the Character of that, which Napoleon bestowed upon the political Press

of France, and which was most fitly described in the Words of Grattan (n), as “a Liberty to hang themselves.”

It is consistent. The Prerogative cannot but be questioned by the Men who disown the Law. The Non Obstante Power which suspends,—the Declaratory Power which nullifies,—Statutes, are identical in their Principle, and their Origin,—are equally well founded in Law,—and differ only in the Forms and Methods of their Application. It is no Wonder, therefore, that a Jealousy which questioned the One should not have spared the Other; or that they who impeach the Competence of Judges, to execute a Trust with which the Law invested them, should also endeavour to obstruct the Monarch, in the Fulfilment of Her Royal Obligations.

Once, and for all, let it be repeated, that, to such Cavillers, no Answer is owing. The Law disdains to be defended against them. The Time may come when it shall be vindicated upon their Persons. Until then it must be satisfied to endure them.

If, from the Revolution of 1688, the Royal Prerogative of Dispensation had been utterly disused, no Argument to its Prejudice could have been founded upon the Desuetude. In my First Lecture, I showed you that the Law of England,—which is Custom,—was not to be abrogated by Practice; and that no Length of modern Practice can ever be drawn into Custom. There is no Prescription against the Written Law;—there is none against the Common Law;—the Charter stands confirmed in all its pristine Vigour, “*licet quibusdam Libertatibus usi non fuerint*,”—the Act of Parliament cannot become void, nor be lost by any Disuse (o). It is the Law which commands Obedience; it is the Citizens who are to render it. But, if they

(n) Speech upon the War with France, 25th May, 1815.

(o) Rot. Claus. 36 Hen. III. 3rd November, M. 32 (in Dorso); Littleton, Sec. 170; 1 Inst. 115 b.

neglect or openly refuse to obey, the Law is not to be made obsolete, and of none Effect;—nor is it even to be weakened in its Efficacy, because of their Neglect and Disobedience.

It would not have been otherwise than natural; if the Dynasties of Orange and Hanover, which owed their Existence and Preservation to their Parliaments, had always resorted to those Parliaments, instead of using their own Prerogative, for the Means of coping with every sudden and unprovided Emergency as it arose. The same Majority, which kept the Minister in Place, ensured to him a present Immunity for all his Actions. In the possible Event of Reverse of Fortune, it was safer and better to be provided with Indemnity, in the Form of an Act of Parliament, to which the Lords and Commons were Parties with the Sovereign, than with a mere Non Obstante Dispensation. The former would be a sure Estoppel to many an Impeachment, where the latter would afford him no Protection.

Thus, where, in former Times, the Emergency of the Case in the solemn Judgment of the Crown's responsible Advisers, justified the Minister of the Crown, in an apparent Departure from the Letter of some Law,—there was made out, under the Great Seal, his Protection, in the Form of a Non Obstante, which screened him from the Pursuit of ordinary Courts of Justice, but left him, in common with those who had advised it, liable to an Impeachment by the Commons, before the Lords of Parliament. But,—the Revolution of 1688 operating, to reconcile the secret Designs of Parliament Men, and Ministers, and thereby to place the Crown Itself at their conjoint Disposal,—the Parties thenceforward laboured in Concert. The Parliament of the Day not only abandoned, in Favour of the Ministers of the Day, their Function of Impeachment, but legislated, on his Behalf, against even the Possibility of an Impeachment, by any future Parliament. In Truth, they

legislated for themselves. He was their Minister. In all his Gains they largely profited, by sharing yet more largely in his Measures,—and, if Crimes were necessary, in his Crimes. Thus, each Bill of Suspension or Indemnity may be, of itself, a more formidable Encroachment upon Law than ever the most arbitrary Abuse of Prerogative could possibly have become. It may even be said that Illegality and Usurpation are of the Essence of every such retrospective Measure. Without a previous Violation of the Law, it is absurd to talk of Indemnity. They who look for Indemnity, to a Majority in Parliament, must deserve it First by plunging into Crime. Can you wonder that Bills of this Character should have superseded the Prerogative?

Yet there are not wanting Examples, of the Exercise, by even Hanoverian Monarchs, of that Prerogative. Numbers of such Examples occurred at an early Period in George the Third's Reign.

In 1765, the celebrated British Stamp Act, then newly passed, had occasioned such a Ferment in America, that the Governors of some of the Provinces, "though bound by the Act," observes the contemporary Historian (*q*), "to swear to see it observed under the severest Penalties,—thinking the total Stoppage of all public Business, of such had Consequence to the Community, as to render lawful the Noncompliance with any Injunctions laid on them, or even the Breach of any Oath, taken by them in consequence of Injunctions, merely for the Sake of that Community—thought proper to dispense with the Use of Stamps: grounding their Dispensation on the absolute Impossibility of procuring any: and, accordingly, granted Certificates of that Impossibility, to all outward-bound Vessels, to protect them from the Penalties of the Act, in other Parts of His Majesty's Dominions." In the following Year, indeed, an



Act was passed, (6 Geo. III. c. 51,) vaguely, and in general Terms, indemnifying all Persons whomsoever, who had incurred Penalties, by any Means, under the Stamp Act.

The Second Instance, therefore, is more remarkable. During the Recess, the high Price of Bread had caused so much Distress and Turbulence, that—although the Corn had not then reached the Price, which, under the Corn Laws of that Time, was a Bar to Exportation,—the King in Council, struck with the Necessity of preserving the Public Safety, by Means of His Prerogative, issued a Proclamation of laying an Embargo on all Exports of Wheat and Flour of Wheat. When Parliament assembled, the Ministers made some “little Opposition” to the Suggestion, that a Bill of Indemnity should be framed and passed for their Protection; and they showed no Readiness to co-operate with those who took the Charge of it, nor any Sort of Solicitude for its Success. The Bill, moreover,—whilst it provided for the Indemnity of the Inferiors, who had acted under the Proclamation,—passed by the Privy Council, which advised and published it; nor was there, in the Preamble, the customary Assertion of the Illegality of the Measure. The Jealousy of Parliament was powerfully excited;—and, perhaps, for the First Time in its Annals, the Ministers of State were compelled to receive an Indemnity, which they not only would not ask, but against which they protested.

Long Altercation and Debate succeeded. The Lawfulness of the Dispensing Power was warmly asserted, on One Side of the House,—unanimously, in other Respects, devoted to the Doctrines of 1688—and as warmly denied upon the Other. The Necessity of the Embargo being admitted upon all Hands,—it was argued, that it was ridiculous to suppose, that the State was without the Power—inherent in every State—of providing for that

public Safety, which Circumstances endangered. That Power was lodged in the King, to be exercised by and with the Advice of His Councillors, and upon their Responsibility. Nevertheless, to meet their Scruples, who saw, in that Proposition, the necessary Condemnation of the Revolution and the Bill of Rights—of the One, as a lawless and wicked, although successful, Rebellion against the Crown, and an Usurpation of its Rights; and of the Other, as a false and scandalous Libel, and an infamous Imposture both on Prince and People—the Leaders of the Majority yielded to the Demands of the Opposition, agreed to the Alteration of the Preamble, and accepted the Protection proposed, by Amendment of the Enacting Part (r).

But, in 1776, when a similar Occasion presented itself, the Ministers were not so tractable. Although no Treaty had then been concluded, the King's Speech announced that foreign Troops were already engaged, for the better Protection of His European Dominions, as well as for the Furtherance of His intended Measures against the revolted Colonies of North America. The Alarm, which this Announcement produced, among His own Supporters, rather than the Hostility of the Opposition, prevailed at last with the Minister; but only to a limited Extent. He consented, with an avowed Reluctance, to bring in a Bill of Indemnity, for himself and his Colleagues, as though for their Departure from the Letter of the Bill of Rights; which had declared, "that the Raising or Keeping a Standing Army within the Kingdom in Time of Peace, unless it be with Consent of Parliament—is against Law." But he positively refused to receive, into the Preamble, any Admission of the Illegality of the Measure. On the Contrary, he insisted that it should, in express Terms, declare, that the Persons indemnified were guilty of no Offence. It was true, that while the War (if the Disturbances in Ques-

(r) X. Ann. Reg. pp. 44—8.

tion could be called such) was only confined to America, the Arrangements, nevertheless, with Respect to the Hanoverian and Hessian Troops, comprehended our Dominions, not only in America, but in Europe, and in every Part of the Globe. It was true, likewise, that they had been made without Consent of Parliament. It could not be denied, therefore, that there had been a Violation of the Letter of the Act of William and Mary. But, they said, that Statute,—being retrospective and declaratory—had confirmed, rather than lessened, the King's Prerogative, to raise and keep Armies, whether in Time of War or of Rebellion, and in every Part of His Dominions.

The Expediency of the Measure, and the Necessity for its timely Adoption, concurred with what had been the Practice since the Revolution, in justifying the Determination of the Minister—to refuse his Consent to the proposed Alteration of the Preamble. The Bill passed the Commons, but was thrown out by the Lords; without Defence or Division. The Ministers disclaimed Indemnity. Both Sides of the House concurred, in ridiculing the glaring Absurdity of the Variance, between the Enacting Part and the Preamble (s). The Measure was never afterwards renewed. Yet no Man, whether in or out of Parliament, ever dreamed of calling upon Ministers, to answer for this apparent Infraction of a Statute.

In 1794, during the War with France, Ministers proceeded further still. A Body of Hessian Troops were disembarked at the Isle of Wight, in that Year, for Refreshment. A Royal Message communicated the Fact to Parliament; but,—upon Grounds of public Policy,—concealed the Destination, and,—for want of exact Information,—did not state the Number, of the Troops. On these Premises, it was moved, in the House of Commons, that, “to employ

(s) XIX. Ann. Reg. pp. 66—7, 79—80, 115—117.

Foreigners in any Situation of Military Trust, or to bring Foreign Troops into the Kingdom, without the Consent of Parliament, was contrary to Law." But the Motion was lost by an immense Majority. Another Motion, however, to which many Ministerialists subscribed, was made in the House of Lords, to the Effect that a Bill of Indemnity should be brought in, for the Conduct of Ministers on that Occasion. This Motion was equally resisted by the Ministers, and negatived by Seventy-Seven against Twelve. The Result showed, that Ministers had not miscalculated the Strength of their Position at the Common Law, in braving Prosecution, and in disclaiming the Indemnity tendered (*t*).

In 1795, we meet with another Example (*u*).

Whilst Parliament was actually sitting, an extra Allowance of Ration Money had been issued to the Army, under the Authority of the Secretary at War, without the Sanction of Parliament, and without even consulting that Body. The Matter was immediately brought under the Notice of the House; and a Motion was made, by One of the then Opposition, for giving Effect, by a formal Vote of the House, to the irregular, unprecedented, and unconditional Grant. "The Soldiery," it was urged, "would, otherwise, be taught to rely on the Generosity of the Crown, preferably to that of the Nation, and its Representatives; and would carry their Attachment to those, whom they looked upon as their best Friends and Protectors." Mr. Pitt, however, justified the Measure, on the general Ground of Necessity; and opposed the formal Vote, on the Ground, that—the Necessity being temporary and occasional only,—the Measure would cease with the Occasion. A warm Debate followed. But, on Sir William Pulteney's Motion, the previous Question was carried, by Sixty-Seven against Twenty-Three.

(*t*) XXXVI. Ann. Reg. pp. 198—205.

(*u*) XXXVII. Ann. Reg. pp. 214—16. •

Not many Years before, there had been Infractions of the Bill of Rights in other Particulars.

In 1759, during the War with Louis XV., Money had been levied, in the City of London, by Grant of the Corporation, for the Use of the Crown, and by Way of Bounty Money for the Land Forces; and it was intended, that the seasonable Supply should operate, to protect the City from the Enforcement of Press Warrants, within its Jurisdiction. Although, by the Bill of Rights, it was expressly declared and enacted, “that Levying Money for, or to the Use of, the Crown, by Pretence of Prerogative, without Grant of Parliament, for longer Time or in other Manner than the same was, or should be, granted, was illegal”—nevertheless, nothing was ever objected against Administration, upon that Ground. Only, in 1770 and 1771, great Complaint was made, on the Part of the Lord Mayor and Aldermen, setting forth that the Immunity as to Press Warrants, which the Levy was meant to purchase, had not been well kept (*x*).

In 1771, a still more striking Example offered itself.

The same Ministers, who, Two Years previously, had brought in the Foreign Troops, now suddenly adjourned both Houses, for a Period of Six Weeks; and, then, took advantage of that Recess to solicit, (unduly, as some declared,) from Individuals, and from Corporate and Unincorporate Bodies, throughout the Realm, separate Grants of Men and Money, to a large Amount in the Aggregate; so that, by the End of the Recess, they had raised, in that Way, several new Battalions and Regiments, for the public Service.

When Parliament met, the Minister informed them, that “the original Purposes of the Adjournment had, not only been answered, by the active Exertions, which had been used in the several Departments of the Public Service,—but that the voluntary, unsolicited Efforts, of several loyal Sub-

(*x*) II. Ann. Reg. Chron. pp. 106—7, 115; XIII. Ann Reg. Chr. p. 169; XIV. *ib.* Chr. p. 68.

jects had, likewise, contributed to that Effect." Notwithstanding the Insolence of this Avowal, followed up by an indignant Remonstrance on the Part of the Opposition, Parliament not only refused to censure the Proceedings, but, without passing the usual Bill of Indemnity, adopted them, and made them its own. It even voted a Supplemental Credit, for supplying what was deficient, in the Contributions so obtained from the Subject (x).

Indeed, the whole Period of the American War is fruitful in Instances of Dispensation with Laws ;—practised at least, and connived at, if not openly acknowledged. Every Prisoner of War, made by our Troops, before American Independency was established by the Treaty of 1782, was, in the Eye of the Law, a Felon; whom not to bring to Justice, was a heinous Offence, second only in Character to his own. Yet, not One American Rebel, as such, was brought to Justice; nor, save in the Field, was the Life of One forfeited. Cartels were regularly exchanged; Flags mutually respected; Passports reciprocally given; the Rights of lawful Belligerents, on both Sides, acknowledged and enforced; and all this without one Act of Parliament. How came it then that Ministers were not impeached, for so criminal a Neglect of Duty? for such it was, in the Eyes of those who were sincere in asserting the Supremacy of Parliament over the Constitutions and the Laws. Yet no Man impeached them. During that Nine Years' War, no Man questioned, in their Case, the Lawfulness of Transactions, which, were the Actors private Men, would have confessedly drawn down Animadversion and heavy Chastisement.

For the Distinction consisted in the constitutional Nature of the Trust. They were the lawful and authorised Servants of the Crown. In them, the Monarch had reposed the Care of His undoubted and indefeasible Prerogative, and, therewithal, had charged them to employ it for

the Safety of the Commonwealth. Hence Justice and sound Policy were the only Standards by which to judge the Lawfulness of its Exercise; and upon their Heads was laid the Responsibility of Collusion or Mistake. It was, indeed, for the Sovereign alone to determine the Necessity or Fitness of the Measure. But their Part it was to counsel Him, —and to abide by the Consequences of Advice, before His High Court of Parliament, and His other Courts of Public Justice. Nor was it possible for them to decline that dangerous Responsibility, nor to evade it by a coward Inaction. To stretch the Dispensing Prerogative beyond the Measure of the Emergency, is certainly a Crime of the greatest Magnitude—but not greater than to let that Prerogative lie idle, or to employ it in a Manner inadequate to the Occasion.

The Americans had taken up Arms to resist the further Encroachments of Parliament. That Body, having absorbed every Independency within the Realm, now threatened those which were without it (y). Acts of Parliament, the Americans said, which invaded Rights, old as the Constitution, and Parcel of the same, were not Law. Their whole Contest proceeded upon that One Issue. The Law triumphed. The old local Independencies were, here at least, preserved from the hitherto triumphant Invasions of Parliament;—and the Taxation Acts went down. In 1783, the King, to

(y) Not many Months before the Close of the War, Lord North himself, defending the Grounds of the Contest between Great Britain and the Colonies, rightly declared it to be false, that it had originated in any Design of Ministers to add to the Power, or Influence, of the Crown. “Had that been their Object, *they had thrown away and rejected the Opportunity*. It was not the Prerogative of the Crown, but the Claims of Parliament, that America had resisted. It was, therefore, to preserve the Supremacy of Parliament, and to maintain its just Rights and Privileges, that they had engaged in the War, and forborne the Offer, of advancing One Branch of the Legislature to the Dominion of America independent of the other Two!”—(Speech on the Address, 27th November, 1781, XXVI. Ann. Reg. p. 129.)

hasten the Pacification, opened Proceedings, by acknowledging at Once the Independence of America; instead of making it the Condition of a General Treaty of Peace, or waiting for the express Authority of an Act of Parliament (*x*). When Parliament ratified that Treaty, it condemned itself. It tacitly confessed the Illegality of former Statutes, made and passed against the Constitution. From that Time, we hear no more of Taxation of the Colonies by Parliament; whilst, on the contrary, we find Mr. Wyndham, Secretary at War, in 1799, crediting Jamaica, in his Statement of Army Estimates for that Year, with an additional Sum, raised and received within that Island (*a*).

On their Side, the Americans,—fully appreciating the Strength, with which their former Reliance upon Law had endowed them, for frustrating the most solemn Acts of Imperial Legislation, and for laying bare their Weakness,—had the Wisdom to profit by that Experience in framing their new Constitution. With a Degree of Foresight and Disinterestedness not generally remarkable in that Scheme of Government, it reserves, in express Terms, to the Judges of the Republic, the Function of examining, and declaring, the Conformity of all future Acts to the Constitution, and of determining, by that Standard, the Degree of the Obedience to be paid them by the Subject. Thus, in America, the inherent Nullity of unconstitutional Statutes, and the constitutional Necessity of dispensing, upon Occasion, with Statutes not otherwise exceptionable, can be established no where but in Courts of Justice, nor declared but by the Mouths of Her Ministers.

Other Instances may be mentioned.

In 1797, without the previous Sanction or Knowledge of

(*x*) XXXV. Ann. Reg. Chron. pp. 282, 322; XXVI. Ann. Reg. pp. 140—1, 167.

(*a*) XLI. Ann. Reg. pp. 173—4.



Parliament, an Aid, or Subsidy, of 1,200,000*l.* had been allotted, by the Crown of Great Britain, to the Emperor, and, another of 200,000*l.* to the Prince de Condé, for the Purposes of the War with France. A Vote of Censure having been moved, in the House of Commons, as for a Breach of constitutional Privilege, an Amendment was carried, by an immense Majority, justifying the Grants in Question, "upon Occasion of Special Necessity" (*b*).

The Year before, the same House had rejected, by Two Hundred and Nine to Thirty-Eight, a Motion for an Impeachment against the Chancellor of the Exchequer, for an admitted Breach upon "the Act of Appropriation, the main Pillar of the Pecuniary Privileges of Parliament; by diverting the Grants to other Purposes." Mr. Pitt boldly justified himself, upon the Ground of the Importance of those Purposes, and asked, "if any Act was to stand in the Way of material Services to the State?" The very Act of Appropriation, he said, recognised the Principle, by making good, under the Head of "Extraordinaries," several Millions so disappropriated. The House agreed with the Minister (*c*).

Indeed, in the famous Proceedings of Parliament, upon the Impeachment of Lord Oxford and Mortimer, in the Reign of Geo. I., we meet with the virtual Recognition—by that High Court of Judicature,—of the Position, that neither the express Letter of an Act of Parliament, nor the Privileges of the Commons in Supply, can prevent the Sovereign from discharging Her Obligations of Honour and Justice.

The Fourth Additional Article of Charge (*d*), recited

(*b*) XXXIX. Ann. Reg. pp. 133—41.

(*c*) XXXVIII. Ann. Reg. pp. 64, 71—2.

(*d*) XV. How. St. Tr. pp. 1094—7, 1142—5. Compare I. Hist. Reg. for 1714, pp. 288—322, 343—359; II. Hist. Reg. for 1715, pp. 49—116; and II. Hist. Reg. for 1717, pp. 313—347.

that "the Revenues, arising to the Crown, from the Hereditary Excise and Post Office, were, by *Virtue of Letters Patent, of the late King James the Second*, charged with, and made liable to, certain Annuities, or Yearly Sums, in Trust for, or to the Use of, Mary, the Consort of the said King James the Second; but the said *Revenues were afterwards, by several Acts of Parliament, granted and settled for Support of the Royal Household, and of the Honour and Dignity of the Crown, or for other Public Uses*; without any Saving or Exception of the said Letters Patents." It further recited that, "by an Act, made in the Twelfth Year of Her late Majesty's Reign, the Sum of 500,000*l.* was granted to Her late Majesty, for the *Discharge of divers Arrears of Saldry, Diet Monies, and other Allowances, and sundry Debts for Pre-emption, Provisions, and other Causes, which had been then incurred, and grown due, to Her late Majesty's Servants, Tradesmen, and others, and were occasioned by several extraordinary Expenses since the Act for the better Support of Her Majesty's Household, and of the Honour and Dignity of the Crown.* And the said Sum of 500,000*l.* was expressly appropriated to the Uses aforementioned, in Aid of the said Revenues, or Branches, which were appointed for the Support of Her Majesty's Household, and of the Honour and Dignity of the Crown." The Article then recited the Acts against the Personage called the Prince of Wales, in the Lifetime of His Father, James the Second, and after that Monarch's Death, James the Third. Then it charged, that the Earl of Oxford had, contrary to those Acts, opened Communications with, and promoted the Interests of, that Prince and His Adherents; and, in particular, by concerting, with the Abbot Gaultier, "the Payment and Remittance of a very great yearly Sum, out of Her Majesty's Treasure, into France; under Colour and Pretence of the said *Letters Patent*" of James the Second. The Article further charged,

that the Earl “did, soon after the Conclusion of the Peace with France, agree and undertake to procure the Payment of the yearly Sum of 47,000*l.* and upwards, to, or to the Use of, the said Consort during her Life ; and, in Execution of his said Purpose, did afterwards, on or about the 23rd of December, 1713, being then Lord High Treasurer of Great Britain, and of Her Majesty’s Privy Council, advise Her late Majesty to sign a Warrant to himself, in the Words or to the Effect following, viz ; ‘ Anne R. Whereas our late Royal Father, King James the Second, by Letters Patent, under His Great Seal, bearing Date on or about the 28th Day of August, 1685, did grant unto Lawrence, Earl of Rochester, Henry Earl of Peterborough, Sidney Lord Godolphin, Robert Warden, Esquire, and Sir Edward Herbert, Knight, (who are all since deceased,) divers Annuities, or yearly Sums, amounting to 37,328*l.* 13*s.* 7*d.* ; to hold to them and their Heirs, during the Life of His then Royal Consort, Mary, now Queen Dowager, in Trust for Her ;—and, by other Letters Patent, bearing Date on or about the 3rd Day of December, 1686, did also grant unto the said Queen a farther Pension, or yearly Sum, of 10,000*l.* to hold during Her natural Life ; All which were made payable, in such a Manner, as in the said several Letters Patent is more fully exprest. Our Will and Pleasure now is, and We do hereby direct, authorise, and command, that you cause Payment to be made to the Heirs of such of the Trustees as was the longest Liver,—of so much as, since the 24th Day of March last, 1713, is incurred, or grown due, on the said Annuities, or yearly Sums, amounting to 37,328*l.* 13*s.* 7*d.* ; and, to the said Queen Dowager or Her Assigns, of so much as, since the said 25th Day of March last, is incurred, or grown due, on the said Sum of 10,000*l.* ; according to the Purport of the several Grants or Letters Patent above recited, as also of what shall hereafter become due and payable, upon the said

several Annuities, quarterly, during the Life of the said Queen Dowager. And, for so doing, this shall be your Warrant. Given at Our Court, at Windsor Castle, the 23rd Day of December, 1713, in the Twelfth Year of Our Reign! And did afterwards, on or about the 24th Day of December following, sign a Warrant, to the Auditor of the Receipt of Her Majesty's Exchequer, requiring him to make and pass Debentures, for paying to such Person or Persons as is, are, or shall be authorised to receive the same, the Sum of 9,332*l.* 3*s.* 4*d.* for One Quarter, incurred upon the said several yearly Sums therein mentioned, from Lady-Day 1713, to Midsummer following; *and appointed the same to be satisfied, out of the Sum of 500,000*l.*, appropriated by an Act, passed the then last Session of Parliament, for or towards Payment of such Debts and Arrears as were therein mentioned*; And another Warrant to the said Auditor, to make and pass Debentures, for paying to the said Queen, or to Her Treasurer, or Receiver, the Sum of 2,500*l.* for One Quarter, incurred on the said Pension of 10,000*l.* per Annum, from Lady-Day, 1713, to Midsummer then just past; *and appointed the same to be satisfied, out of the Sum of 500,000*l.*, appropriated by an Act, passed the then last Session of Parliament, for or towards Payment of such Debts and Arrears as were therein mentioned.*" Other Charges followed, and then the general Charge,—that thereby, (amongst other Things,) the Earl advised the late Queen, "under Colour of the said Letters Patents, and without the Advice of Her Council, OR Her Parliament, to direct the Issuing of the Revenue, provided by Parliament, for the Support of the Honour and Dignity of the Crown, to the Use and Benefit of the open and avowed Adherent of the Pretender," (the Queen Dowager).

In his Answer, the Earl of Oxford and Mortimer,—after denying all unlawful Concert, with the Queen Dowager and

Abbot Gaultier, and all Knowledge of their Designs, as laid to his Charge, admitted, in the fullest Manner, the Special Letters Patent and Appropriation Acts, referred to in the Fourth Article; and he set forth their material Contents. He then went on to say, that “ he had heard, that the said late Consort of the late King James the Second, esteeming Herself to be entitled by the Laws of England, by the various Letters Patents, to the various Sums of Money thereon mentioned, did, by Letter of Attorney, empower and authorise the said Monsieur Gaultier, to demand, and receive, for Her only Use, Benefit, and Behoof, all Sums of Money, which from and after the Feast of the Annunciation of the B. V. M., 1713, were become due and payable upon the said several Annuities, amounting to 37,328*l.* 13*s.* 7*d.*, and the other Annuity, or yearly Sum, of 10,000*l.*; and to give Acquittances, and Discharges, for the Monies he should so receive, to Her only Use and Behoof as aforesaid; and that therefore he, the said Monsieur Gaultier, applied himself to Her Majesty, for the Payment of the Monies, which were incurred, or grown due, on the said several Annuities, from the said 25th Day of March, 1713, and that Her Majesty was pleased to sign a Warrant, &c., in the Words, or to the Effect in the said Article set forth, &c.; and that, in Obedience to Her Majesty’s Commands, signified by the said Warrant, he the said Earl did direct Two several Warrants, &c., to the Effect in the said Article set forth, &c., and that, *the Legality of the Demand not being doubted by Her Majesty’s Counsel, learned in the Law*, the said Earl thought it his Duty to pay Obedience to it. *And,—the Sum of 500,000*l.* intended to be raised by the said Act of the Twelfth Year of Her Majesty’s Reign, together with a great additional Sum, in Tallies, being designed for Discharge of Her Majesty’s Debts,—the said Earl thought himself sufficiently authorised to direct, that the said Sum of Money,*

mentioned in the said Warrants—WHICH, HE WAS ADVISED, WAS A DEBT FROM HER MAJESTY,—should be paid out of the said 500,000*l*. And the said Earl humbly hopes, that he hath not hereby betrayed the Honour of her late Majesty, or the Imperial Crown of these Realms, or acted contrary to his Duty.”

The Commons having, by Replication, denied the Truth and Sufficiency of the Earl's Answer, the Trial took Place in Westminster Hall. The Prosecution was opened on Behalf of the Commons. They, however, called no Witnesses, and eventually absented themselves altogether. But, as the Impeachment had been opened, and the Lords charged, it was necessary for the latter to give Judgment upon the Articles, singly and collectively. In this Respect, their Situation was precisely similar to that of a Court, having to decide upon Bill and Answer, or upon a General Demurrer for Want of Equity. They had to take the Statements of the Answer as true. They were to believe, therefore, that, on the one Hand, the Earl of Oxford was—(for he so declared himself)—innocent of the secret Purposes laid to his Charge; but, on the other Hand,—(for he admitted the Fact,)—that he had broken in upon the Parliamentary Appropriation of the Supplies; in order to pay the Debts of a former King, not only not provided for in such Appropriation, but actually prevented,—and almost prohibited,—by an express Act of Parliament, from being paid at all.

Upon that State of the Case, their Lordships were called upon to give Judgment. The Impeachment was no longer in a Condition to be withdrawn. The High Court of Parliament were already charged with it;—and upon the charges confessed, as well as upon those which were denied and unproven, Judgment was accordingly given. The following was the Form in which it was entered:—

“ It is considered, ordered, and adjudged, by the Lords, Spiritual and Temporal, in Parliament assembled, that Robert, Earl of Oxford and Mortimer, shall be, and is hereby acquitted of the Articles of Impeachment, exhibited against him by the House of Commons, for High Treason, and other High Crimes and Misdemeanors, and of all Things therein contained; and that the said Impeachment shall be, and is, hereby dismissed ” (e).

The Judgment in Lord Oxford's Impeachment was given in 1717. In the same Year, we meet with a similar Example of Supply disappropriated; and by the Act of his Prosecutors.

Among the Estimates voted by the House, in a Grand Committee on the Supply, an Item passed in the following Terms.—“ For replacing 10,000*l.*, issued, out of the Appropriated Revenues of North Britain, to the Duke of Argyll, 10,000*l.*” Although the Opposition,—always vigilant,—was then unusually powerful, and led by such Men as Sir William Wyndham, Mr. Shippen, and the Walpoles, the Disappropriation was not censured, and the Vote passed, without even a Comment. (f).

In 1745, Twelve Noblemen offered to raise each a Regiment at his own Expense. The Lord Chancellor Hardwicke having declared the Lawfulness of the Undertaking,—their Offers were accepted by the Crown;—and, notwithstanding the Murmurs raised against Ministers on that Account Provision was afterwards made, by Parliament, for the Subsistence of the Levies so raised (g).

The same Experiment was renewed, but more openly, in 1782. In that Year, the Counties and great Towns of England were officially applied to, by Circular Letters,

(e) XV. How. St. Tr. pp. 1177—8.

(f) II. Historical Register for 1717, pp. 152—3.

(g) XXXVI. Ann. Reg. pp. 240—1.

addressed to the Lords Lieutenant, and other Officers, by Lord Shelburne, the then Minister; requesting them to furnish to the Crown a certain Number of Men, and stating the Share, which Government would take, of the Expense. The Peace, which speedily followed, rendered the Project unnecessary. But the Letters remained uncensured, as they certainly were unsanctioned, by Parliament (*h*).

Soon after the Beginning of the War with France, in 1793, the Ministry had issued, to the Lords Lieutenant of Counties, and others, Circular Letters of Requisition, under the Name of a Recommendation for the Raising of Volunteer Companies of Horse and Foot, to preserve Peace, and suppress Rebellion, at Home, and to repel Invasion. Parliament not having been consulted on the Subject, it was brought,—in the Beginning of 1794,—under the Censure of both Houses, and several warm Debates ensued. The Ministers refused to lay the Circulars before the House,—justified their Conduct by Precedents,—and denied the Charge of having employed, in any Way, the odious Means of Compulsion;—in which alone, as they were advised, the Illegality of Benevolences consisted. In these Views, they were supported, by overwhelming Majorities, in both Houses of Parliament;—and, accepting no Indemnity, they were nevertheless not called upon to answer further for their Conduct (*i*).

The Two Instances with which I shall conclude my Illustrations related to the same Matter. It was One, in which, out of a Regard to the supposed Necessity of the Case, not only the Bill of Rights, but all the Laws of the Land by which Liberty and Property are sustained, were dispensed with. And it is the more appropriate to my

(*h*) XXXVI. Ann. Reg. pp. 236—40.

(*i*) XXXVI. Ann. Reg. pp. 235—41.



present Purpose, because there the Dispensation was granted,—and, in that Regard, properly so,—not by One calling himself a Cabinet Minister,—as, in some of the other Instances, the illegal Method was,—but by the only competent Authority, the King in Privy Council.

On the 16th of June, 1721, Mr. Methuen delivered a Royal Message in the House of Commons, recommending a Subsidy to Sweden ;—and also stating, that “ His Majesty, —being informed that Two Ships, called the ‘ Bristol Merchant ’ and ‘ Turkey Merchant,’ now lying under Quarantine, did arrive from Cyprus, and other Parts of Turkey, infected with the Plague, and have Cotton, Wool, and other Goods on Board, which are dangerous to spread the Infection ; and conceiving it necessary, for the Preservation of the Health of His Subjects, that the said Ships and their Ladings be burnt and destroyed, and that a reasonable satisfaction be given to the Owners,—hath, by advice of His Privy Council, caused the Value thereof to be computed, by His Majesty’s Officers, and ordered those Computations to be laid before the House of Commons, that Provision may be made for satisfying the same.” This Message was immediately taken into Consideration ;—and, although the Subsidy to Sweden caused much Discussion, none took Place upon the other Part of it ; and the whole was acceded to without a Division. On the 21st of June following, “ a Sum, not exceeding 23,935*l*.” was voted, for the Purpose of compensating the Owners of the Two Ships (*k*). Here the Decision was taken without consulting Parliament ; and, to enable the Sovereign to carry it into Effect, a mere Vote of Supply, and not a Suspension Act, was all that was thought necessary.

In the next Case, the Prerogative was exercised in a still

(*k*) VII. Parl. Hist. pp. 844—8 ; Compare VI. Hist. Reg. for 1721, pp. 224—8.

more signal Manner, because there Parliament was not applied to at all, until after the Decision had been executed.

At the End of 1799, Three Ships arrived in British Ports, from Mogadore, with foul Bills of Health. They had left that Place, when the Plague was raging there with the greatest Violence ;—and, the Goods on Board being reported,—after an Inquiry, conducted according to the same erroneous Notions, then and still prevailing here, upon Quarantine and Contagion,—to be susceptible of Infection ;—and it also appearing, that they had been put on Board under suspicious Circumstances ;—King George III. in Privy Council, ordered the Three Ships, and their Cargoes, to be destroyed, in “Conformity with antient Usage and Precedent.” After those Measures had been actually taken,—and so were irretrievable—a Royal Message communicated the Fact to the House of Commons, and recommended the Propriety of their considering the Case, and of making an Allowance to the Owners, if found deserving of it. The Thanks of the House were voted for the Message ; and a Committee was appointed accordingly. In the End, the House granted, for the Satisfaction of the Losses so sustained, the Sum of 41,400*l*. “There are few Instances,” adds the contemporary Historian, “in which the Vigilance, Prudence, and Justice, of Government have been more apparent, than in the whole of its Conduct in that Business.”

The only Parliament which ever denied the Prerogative of Non Obstante, was almost the only One, which, without that Prerogative, could not claim a legal Existence. It was itself the immediate Offspring of an armed Revolution, which, instead of dispensing with some Laws, in some Cases, suspended, at Once, the whole Body of the Law. It cannot

surely be said that, because Arms were employed to effect it, the Hazard of the Change was the less; or that the Importance of the Interests attacked took away the Illegality of the Invasion. It is true that the Partisans of the new Parliament affected to rely upon the Words of the Statute of Henry VII., and upon their King's *de Facto* Title, for the Lawfulness of their Acts. That is to say, the Men, who denied the Prerogative, in its Relation with the Necessities of Government, and who reduced the whole Constitution into a mere Doctrine of Parliament, were contented to make, of that very Prerogative, the sole Foundation and Support of all the constitutional Titles of their Parliament.

If other Proof were wanting,—to establish the immense Superiority of Character, which distinguished the stern old Men, that wrought the Great Rebellion, from those weak Traitors, flourishing over the prostrate Corse of England, in 1688,—we have it here, in this very Matter of Prerogative. Compare the sound deep Learning, of the Puritan Lawyers and Parliament Men, with the Sophistries of them that endeavoured to fill their Footsteps. The First knew how to condemn, what they believed to be, Usurpation, yet without doing Harm to the just Prerogative. Their Strength was in the People's Reverence for Law,—that Law, whence the Prerogative derived its Strength,—and they were cautious not to weaken it.

When Holborne spoke for the People, in the famous Case of Ship Money,—when Glanvil met the Lords in the Painted Chamber, and defended the Petition of Right,—a Measure not always so Constitutional as its Advocate alleged,—it was not for an Interest, nor for a Faction, that they challenged a Hearing, but for the Commonwealth. They had persuaded themselves that, upon the good Success of their Exertions, depended the Honour and Happiness of their incensed Sovereign, together with the Rights and Franchises

of those, of whom they were the immediate Representatives.

“The King,” Holborne declared (*m*), “may dispense with penal Statutes, and make them as none. Doth any Law say He shall not do it? The Reason differeth in that Case. There is a common Necessity, that there should be a Power in somebody ;—for Acts of Parliament are but *Leges Temporis*! It is One Thing, for the King to have Power, in Point of Favour, and another, in Point of Charge. So, in Case of Pardon, there is no Hurt, if He doth pardon. God forbid that He should not have Power to show Mercy!”

It has been pretended, that those Men denied the Right of Ship Money in all Cases, and even where the Charge was necessary. But it was the Fact of the Necessity, that Holborne questioned, and not the King’s Right. “This,” he said (*n*), “on His Majesty’s Part, hath been stated, on these Records :—whether the King,—finding, in His Judgment, the Safety, and Preservation, of His Kingdom, and People, necessarily, and unavoidably, to require the Aid, commanded by this Writ—might not command such an Aid, by this Writ, for saving and preserving of the Kingdom and People? Wherein, I confess, there is not One Word, but hath its Weight. . . . If it be so, that this Kingdom was in such Danger, and that the Danger was so instant and unavoidable . . . these be Things wherein we differ.”

Of the like Weight of Character, were the Reasons, which Glanvil, upon Behalf of the Commons of England, whose Delegate he was, advanced at the Free Conference ;—“not” he said (*o*), “as the Sense of himself, the weakest Member of their House, but as the genuine and true Sense of the whole House of Commons :—conceived in a Business, debated there, with the greatest Gravity and Solemnity, with

(*m*) III. How. St. Tr. p. 1014.

(*n*) *Ib.* p. 966.

(*o*) II. Parl. Hist. pp. 364—5; and XI. St. Tr. pp. 1261—2.

the greatest Concurrence of Opinions and Unanimity, that ever was in any Business maturely agitated in that House.” “We know,” he went on to say, “there is a Trust, inseparably reposed in the Persons of the Kings of England. But that Trust is regulated by Law. For Example, when Statutes are made to prohibit Things,—not *Mala in Se*, but only *Mala quia prohibita*,—the Commons must, and ever will, acknowledge a Regal, and Sovereign, Prerogative in the King, touching such Statutes ;—that it is in His Majesty’s absolute and undoubted Power, to grant Dispensations, to particular Persons, with the Clauses of *Non Obstante*, to do as they might have done before those Statutes. But there is a Difference, between those Statutes, and the Laws and Statutes, whereon the Petition is grounded. Laws,—not inflicting Penalties upon Offenders, in *Malis prohibitis*,—but Laws declarative or positive ; conferring, or confirming, *ipso Facto*, an inherent Right and Interest of Liberty and Freedom, in the Subjects of this Realm, as their Birthrights and Inheritances descendable to their Heirs and Posterity !—Statutes, incorporate into the Body of the Common Law ; over which—(with Reverence be it spoken)—there is no Trust in the King’s Sovereign Power, or Prerogative Royal, to enable Him to dispense with them, or to take away from His Subjects that Birthright, or Inheritance, which they have in their Liberties, by Virtue of the Common Law, and of those Statutes !”

Such were not their Views, in 1688, who changed the Dynasty of England. Then, not the Liberty of the Subject, nor the Laws and Statutes which declared it, but the Privileges of Parliament Men and Place Men, were the Objects aimed at. The Title of the reigning Dynasty secured the Connivance of Princes. The Interests of every Member of the Majority in Parliament were bound up with those of the Ministry ; and that Majority became a Stand-

ing One. Such was the Understanding, which, henceforward, was to prevail, between those old Antagonists,—Corruption and Control. It needed but the Bill of Rights to seal and ratify the Compact.

The Bill of Rights originated in the Convention Parliament. That was the Assembly, which, in the Language of the Preamble (p), “His Highness, the Prince of Orange, the glorious Instrument,” and so forth, had caused to meet at Westminster; “pursuant to their respective Letters, and Elections under those Letters,” signed by Himself. The Bill being “declared,” by the Assembly,—and the Crown being, at the same Time, accepted, by “William and Mary, Prince and Princess of Orange,”—the latter became, and were declared, “King and Queen of England, France, and Ireland, and the Dominions thereunto belonging. And thereupon,” pursues the Preamble, “Their Majesties were pleased, that the said Lords, Spiritual and Temporal, and Commons,—being the Two Houses of Parliament,—should continue to sit, and, with Their Majesties’ Royal Concurrence, make effectual Provision for the Settlement of the Religion, Laws, and Liberties of this Kingdom;—so that the same, for the Future, might not be in Danger again of being subverted. To which the said Lords, Spiritual and Temporal, and Commons, did agree, and proceed to act accordingly.” The Bill then went on,—“in Pursuance of the Premises,”—to pray the Declaration, and Enactment, of “all and singular the Rights, and Liberties, asserted and claimed in the said Declaration. And, accordingly, the same were declared, enacted, and established, by Authority of the then Parliament.”

Amongst those “Rights and Liberties,” the following were included:—

- “1. That the pretended Power, of *Suspending of Laws*,  
(p) Stat. of the Realm, 1 W. and M. St. II. c. 2.

or the Execution of Laws, by Regal Authority, without Consent of Parliament, is illegal.

"2. That the pretended Power, of *Dispensing with Laws*, or the Execution of Laws, by Regal Authority, *as it hath been assumed and exercised of late*, is illegal."

And, lastly, as though out of an abundant Caution, it was enacted, in express Terms, "that, from and after the then Session of Parliament, no Dispensation, by Non Obstante of or to any Statute, or any Part thereof, should be allowed ;—but that the same should be held void, and of no Effect;—*except a Dispensation be allowed of, in such Statute;—and except in such Cases as should be especially provided for, by One or more Bill or Bills; to be passed during the then Session of Parliament.*"

Such, then, were those Provisions of the Bill of Rights, by which it was intended to destroy the Prerogative. It remains to be seen how far they were even calculated to effect their Object.

With Respect to the First of the Clauses, it is only to be observed, that it related to what never did, and never could, belong to the Crown. The Power of Suspending of Laws was, in every Sense, a "pretended Power." It was a Pretence, upon the Part of those few Sovereigns who ever laid Claim to it. It was a Pretence, upon the Part of all whether Sovereign or Subject, who affected to confound it with the undoubted Prerogative of Dispensation. The First Clause, therefore, which condemned it, unreservedly, as illegal, declared the merest of Truisms.

But, with Respect to the Second Clause, the Fact was far otherwise. Neither the Exercise of the Dispensing Prerogative, nor that Prerogative itself, were condemned generally ; but only, so far as the same "had been assumed and exercised of late ;" that was, by King James. In Fact, it was an Endeavour to reverse—by a Side Wind,—by a

Declaratory Act,—the solemn Decision, pronounced by the English Judges, in the Case of *Godden v. Hales*. So, in the Parliamentary Session of 1843 (*q*), you might have seen the most solemn Decisions of the Scottish Law Courts, and the British House of Lords, set aside; upon the same Pretence of removing Doubts, where no Doubts existed, and of declaring Laws, which the Declaration was to violate. But, great as that Indignation must be, which the very Thought of such Things suggests to the Mind of the Patriot, there is at least this Consolation—that it will ever be the Province of Scottish and of English Judicatures, to reject those Usurpations, and to cleave unto the Law, whose Forms are profaned—whose Name is desecrated.

It is true, that the Disabling Clause, which forbade the future Exercise of the Non-Obstante Prerogative, was more clearly expressed. It is perhaps true, that, but for its gross and obvious Illegality, it might have been sufficient for the Purposes aimed at. But even that is not so clear. There was an Exception, made in Favour of every “Dispensation, allowed of *in* a Statute”; and that Exception was too ambiguous in the Wording, ever to have sanctioned a Construction against the Crown. In One very plain and obvious Sense, it imported nothing but what was always the Doctrine of the Common Law, touching the Prerogative. No Statute could ever be dispensed with, by the Prerogative, but such as, in Point of Law, did “allow of” such Dispensation.

It may be added, that, as this Clause of Exemption stood, its Framers did not consider it perfect. Other Exceptions might be “specially provided for, by One or more Bill or Bills; *to be passed during the then Session of Parliament.*”

(*q*) 6 & 7 Vict. c. 61; “An Act to remove Doubts, respecting the Admission of Ministers to Benefices, in that Part of the United Kingdom called Scotland.”



Words, which perhaps imported more than a mere Reservation of Power to legislate. But, in Fact, no such Bill or Bills were ever passed; then or afterwards. That Session ended on the 27th of January, 1690. On the 24th of May, 1689, it had been ordered by the House of Lords, "That the Judges do prepare an Act, for regulating Non Obstantes." On the 14th of November following, their Lordships sent for the Judges,—and, after reprimanding them "for their Not-Attendance daily in the House,"—acquainted them, by the Speaker, "That the Lords expected their daily Attendance;" and ordered them, "to prepare a Bill, for regulating Non Obstantes, with all convenient Speed." In Pursuance of that Order, the Judges, in the same Session, prepared,—and, on the 5th of December, 1689, presented,—a Bill, intituled, "An Act, for the Repeal of divers Clauses, in the several Statutes after mentioned;" which was then read a First Time, and, on the 3rd of January, 1690, passed the Second Reading. On the 14th of January, 1690, it was ordered, "that the Bill shall be considered, in a Committee of the whole House, on Friday next;" which Order was, on the 17th of January following, enlarged to the ensuing Wednesday. But that is the last Entry to be found concerning it. The Measure went no further in that Session, which was determined, by Prorogation, on the 27th of January, 1690. Nor was it ever afterwards renewed, in either House of Parliament (*r*).

I do not know what Validity there may be, in the Objection last stated. But, whatever may be the literal Construction of the Clauses to which they relate, we still must be of Opinion that those Clauses were inoperative and void. For they purported to bind a Prerogative, which was far beyond the Reach of Parliament, and to exercise a Power, which

(*r*) XIV. Lords' Journals; pp. 218, *a*, 342, *a*, 362, *a*, 402, *b*, 412, *a*, 418, *b*.

Parliament did not possess. In enacting those Clauses, the Legislature exceeded its Functions; and its Act,—albeit Act of the Parliament,—nevertheless, did not become Law.

It was no new Experiment. Already, in former Reigns, it had been attempted, and ever without Success. The Courts of Law were ever careful to undo the sometimes unlawful Acts of the Parliament. Far stronger in Terms, far closer in Application, were those Statutes of Plantagenet and Lancastrian Kings, which have been cited; and whereby the Non-Obstante Prerogative seemed to have been for ever taken away, in the Matters to which they referred. But those were only the Appearances of Laws, and misled no One. The sole and inseparable Prerogative flourished still, by the Side of the Sovereign. It was neither to be restrained, to be nor taken away, by any mere Act of Parliament. At the very best, such an Act was but a Nullity. In no Case could it become Law.

Suppose it to be true, as the Assailants of this Prerogative are still in the Habit of contending, that the Bill, which declared it void, was a great constitutional Measure,—demanded, by the actual Exigencies of the State, for the Protection of Freedom, and the Maintenance of Law. Then certainly that Measure should receive a large and liberal Extension, in whatever of its Clauses imported Relief, but a close and jealous Restraint, in all such as purported to disfranchise the Subject, or to fetter and degrade the Crown. Either the Bill of Rights was framed but for its own Time;—and, if so, it expired with the Occasion that produced it;—or it was destined for the most distant of Times, and the most varied of Circumstances. Take it either Way;—how could the Prerogative be restrained by such an Act? If temporary, it has long since ceased to bind. But, in no Case,—unless so far as the Law of England sanctioned and

determined the Application,—had it ever any Power to bind.

It is, above all Things, strange, to hear those insisting on the contrary Propositions, whose frequent Example furnishes the Confutation of their Precept. It were amazing, indeed, if the Clauses, in the Bill of Rights, which curbed and fettered the Prerogative, were to stand in all their Force,—working Grievance and Wrong, in every unprovided Case,—without any Power residing in the Crown, to temper and mitigate their Harshness. It were still more amazing, if those obnoxious Clauses, importing Disability both to Crown and Subject, were the only Clauses, in the Bill of Rights, to which the Crown was bound to render an Obedience fanatical and ruinous. Yet, while the History of England, from 1689, abounds with Measures,—supported still, as constitutional and proper in every Sense, although, in every Sense, opposed to the express Language of the Bill of Rights, and justifiable only, if at all, upon the broad Ground of Non Obstante,—there was not One, which formally denied the Validity of the Clauses, whereby Non Obstante had been taken away. Not One, which openly asserted the absolute Incompetence of Parliament, to take away Prerogative and to destroy Law !

For the Validity of whatsoever Enactment of the Parliament is to be measured only by the Standard of Religion and Justice.

Thus, Enactments, unjust in their Origin, are, from their Origin, unlawful and void ;—and, as such, and not otherwise, they are to be regarded, and declared, in every Court of Judicature.

Thus, too, other Enactments, not originally unjust, may occasionally become so in the Application ;—and, to that Extent, undoubtedly, they are illegal.

But,—while the Constitution hath imposed, upon every

Subject, the Duty of examining and ascertaining, for himself, when and where it becomes illegal in him to obey the Statutes of Parliament,—it hath also thrown around him the Prerogative of the Crown, for his better Performance of the Office. He may have Recourse to that antient Common Law Tribunal, the Queen and Her Privy Council, in Their corporate Capacity assembled. He may seek Their Judgment, upon the Equity of the Statute, in its Application to himself. He is competent, if the Case demand it, to receive,—and They have the Jurisdiction to issue—as Depositaries of that Prerogative,—the Royal Dispensation in his Favour, having the Clause of Non Obstante to the Statute. He may produce that in the Courts of Justice; and, when equitable, it is valid, and ought to be allowed. When the Prerogative is interposed between him and the Letter which slayeth, he is free; and upon the Ministers of that Prerogative devolves his Responsibility.

Parliament alone may ruin the State. But Prerogative may save it.

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In concluding this Course of Lectures,—which I do with considerable Regret, and a deep sense of your Kindness,—I am but too conscious, that we have not been able to devote the necessary Time and Study, to Enquiries which are so useful, and so well deserving of both. Nevertheless, let me hope that what we have done will not be fruitless. If we have not very profoundly investigated the Sources of our Laws and Constitutions, we have, at least, not without Diligence, endeavoured to follow their Course. We have traced their Descent, from the Forests of Germany, and the Camps of the Legion, through intervening Ages, and many Vicissitudes, to our own Times. We have watched their Progress, and also their Decline. We have compared the Growth of modern Corruption with

ancestral Greatness. In the Justice of our Fathers, we have had presented to us, the Measure of the Degeneracy and Wickedness of their Descendants. In appreciating Them, we have been unconsciously enabled to know and condemn Ourselves.

I do not flatter myself that this hasty Sketch of the History of Two Thousand Years,—in tracing which, I have been obliged to deny myself very often the Pleasure of illustrating, or even explaining, the Terms employed,—has made you much better acquainted with the important Subject, than you were before. But I do trust, that, in One Respect, I have not been unsuccessful;—that I have enabled you to see and understand the Means that are before you, for gathering unto yourselves the Fulness of that Knowledge, of which I have but indicated to you the Commencement. And, as you see them and understand, so it behoves you to employ them.

Think of the Purpose, to which those Means are to be employed. It is the Acquirement of the Knowledge, and Practice, of your commonest Obligations to that Country, which hath such Claims upon your Duty and Reverence. Those Obligations at least are imperative. Those at least you must perform. But the due Performance of the Obligations necessitates a previous, and an accurate, Acquaintance with their Nature, and with the Laws, by which they are imposed. To know those Laws thoroughly—as Citizens of your Conditions and Callings ought to know them—the previous Study of their History is an almost indispensable Condition. This general Duty of all Citizens is doubly and specially incumbent upon you, who are Catholics, and should better know your Duties to your Neighbour and yourselves, than others, not so well instructed, can know them;—and who,—being Catholics,—behold yourselves separated from the vast Majority of your fellow

Citizens ;—not only in Religion, but in the Exercise of Rights, Political, Municipal, and Religious. You are Children of a Church which teaches you, that “*Pietas ad omnia utilis est* ;” and which condemns the opposite Heresy, that would sunder Politics, or any other Department of the great Field of Morals, from Her holy Keeping. You are of a Minority ;—whose moral Power is immense ;—whose physical Power is nothing ;—and, therefore, in you the Neglect of Right would be Suicide. The Law is your only Stronghold. The Minority which abandons that is lost.

And yet, amongst us all, there are few, who see that, not only it is a political Heresy to assert, that Injustice can ever be expedient to any Commonwealth, but much more,—that it is an imperishable and eternal Truth, that, without Justice, no Commonwealth can, in any Way, maintain itself. Still fewer who see it, otherwise than by an Act of intellectual Vision,—the Will having no Portion in the Act ;—and who admit the Proposition, as something more than an useless, Ciceronian, impracticable Truism, a learned Curiosity for Antiquarian Cabinets ! That it is capable of being realised,—that we are bound to realise it,—that it was meant for Practice, not for idle Pageantry,—these are Propositions, which, to many Eyes, present the most flagrant and startling Absurdity. There are a few Exceptions, and honourable Ones ;—but as rare as they are honourable. Taken in the whole, it may be truly said of this English Nation, there is none that understandeth.

It is with the World of Intelligence as with the World of Matter. When its Elements begin to decay and to rot, the Forces which, while they were yet in Health, maintained them in their Normal State of Vigour and Activity, give Place, not to dead Stillness and Unproduction, but, to

other Forces, generating strange and unnatural Forms of new Existence. Nothing wholly dies. Nothing is without some inward Virtue, manifesting itself in outward Action. Like the Boat mentioned in the *Æneid*, Existence must proceed onwards or backwards, or drift from Side to Side. You cannot hope to moor it in Mid-channel. If the Life dies, the Death, which supervenes, dies not, but lives ;—and, living, it breeds all Manner of fantastic and unutterable Prodigies ; so as therewithal to people, what else would have become, a lifeless and uninhabited Creation.

Nations and States are under this common Lot of Existences. Conservation demands the constant Presence and Action of productive Power. It implies, no Doubt, the Maintenance of the Forms and Types themselves. But above all, and before all, it implies, that the Spirit which inspired them—which created them, and put them forth,—shall be maintained in all its Life and Energy. Inscribe your Laws upon the Parchment Roll. Bind them into Volumes, and carefully lay them up in some Fire—Air—and Water-Proof Repository ; where they may be found, some Thousand Years hence, fresh, and fair, and new, as they appeared on the Day in which they were placed there. Your Veneration of these Formulas is praiseworthy, so far. But to what Purpose is it—if you have forgotten the weightier Matters of the Law ? You have kept the Husk and revered it, and so far you have done well. But where is the Kernel ? To busy oneself thus, about merely æsthetic Occupations,—to take such Pains to preserve old Muniments, like Articles of Virtù in a Coffre,—and not to take any Pains to understand them, to believe them, and to love them ;—to preserve the Creature for its own Sake, and not for the Sake of the Spirit which created it ;—to cherish the Symbol, and to despise the Thing signified ;—is this Conservatism ? In such grovelling Quackery as

this, the creative or conservative Genius can find small Matter, methinks, whereon to exercise itself.

No Constitution ever preserved itself, where private and public Virtue had become extinct. But private and public Virtue has ever stood in the Place of Constitution and of Law. Your and my common Ancestors, who roamed through Forests, over Spots where we now sit down in fair and peopled Cities, are historic Witnesses to this Truth. The thoughtful Patriot of Rome, musing over the Growth of Corruption—over the Conspiracies against Law,—over the Loss of Justice—beheld in Germany the Converse of the Spectacle. There Tacitus found the Laws of Modern Europe,—not in their perfect state, indeed, for no Greatness was ever born an Adult,—but in Germ and in Principle he found them. Those Laws, in Spite of all our Endeavours to crush and destroy them, we have in England to-day. Over those Men, their own Morality enjoyed a greater Influence, than the soundest Laws, unaided by the like national Character, possessed elsewhere (s).

The English Constitution has not stood still. So long as Christendom existed in its intact Unity, and in the Knowledge of its Duties, and the Religion of Englishmen was powerful and free; their Constitution was marching onward. When it ceased to make Progress on that March, it began to retrograde. It has never been at Rest. In better Days, it worked spontaneously,—and well. In these latter Days, it has been worked—by base Hands, and for base Purposes. In well Doing, or in evil Doing, every Constitution must move, or be moved, and give no Sign of Weariness. Thus Britain, ceasing to be fruitful in great and good Things, has become prolific in every kind of Wickedness and Absurdity. And the Sons of Britain look

(s) Tac. de Germ. c. 19.



on, with a slothful Ignorance—that fears to be enlightened,—or what is worse, with Understanding and Approbation.

A strange Impression seems to have taken hold of even Catholic Minds in this Country. Because the Reformation left it without One check upon arbitrary Power, beyond the few public Institutions which it suffered to exist,—and all the While perverted,—it is supposed that this was always so, and that the antient Liberties of England were ever, as now, at the Mercy of a theoretic Balance of Monarch, Peers, and Commons; in which Balance all the Excellencies, to be found under absolute, feudal, and popular Governments, at Once, are supposed to consist.

Not long ago, I met with a curious and learned Series of Papers, evidently from a Catholic Pen, and written with the most honest Intention of vindicating the aspersed political Honour of the Ages of Faith. But the Writer was under the Domination of modern Errors;—and writing, even as he thought, in the Spirit of the Times he lived in, instead of those he was describing, he confused the Matter;—and, as it appeared to me, altogether failed of his Object. The whole Plan of his Operations seemed to aim, solely, at illustrating modern Theories, about Rights of Man and Social Compacts, by Means of old Chroniclers—whom a Digby would have read in quite another Fashion, and cited for quite other Purposes. The Writer was but One Type of his Age and Nation. We invent the History of our Commonwealth. We treat our own Thoughts on Jurisprudence as having comparative Perfection. We endeavour to ordain their Praises, out of the Mouths of Norman Jurists and Anglo-Saxon Lawgivers. We accept the Bill of Rights, as it is called, and undertake to show that Magna Carta was not inferior to it. We hearken to a Voice, proclaiming the Sanctity of our actual Parliamentary Usages.

We endeavour to prove that our Forefathers had their Speaker, and Sergeant-at-Arms, and Two Doorkeepers to defend the Entrance to the Lower House from the Lobby.

It will be many Months, probably, before I have another Opportunity of addressing you. I trust that the Interval will be improved, in rectifying your Judgments upon these important Subjects, and in guarding yourselves against the monstrous Errors to which I have adverted.

The Bounty of your Sovereign has placed within your Reach the only true and authentic Sources of your Country's History, in the contemporaneous Records of the Events composing it (*t*). I implore you to make an early and a diligent Use of the Royal Indulgence, and to search those Sources thoroughly to the Bottom. Let me find you, when we meet again, more just to your antient Commonwealth and your antient Faith, than to suppose them to have been, in any Way, Partakers in those base Platitudes of modern Invention, against which I have endeavoured to admonish you.

“Put not your Trust in Princes,” is now an unnecessary Warning. The Days of arbitrary Prerogative are no more. In the World on which you are about to enter, you will find small Temptation to exceed, in your Monarchical Attachments. The Danger is now the other Way. The far more appropriate Warning would be:—“Put not your Trust in Parliaments.” Do not degrade the Freedom, which is your

(*t*) In Consequence of my Appointment to the Chair of Jurisprudence at Prior Park, I made an Application, on the Part of the College, to which Secretary Sir James Graham was pleased to advise Her Majesty to accede, for a Set of the printed Public Records of this Kingdom. As complete a Set as could then be had of those valuable Publications was accordingly placed at the Disposal of the College. I gladly avail myself of this Opportunity to record my grateful Sense of the Courtesy and Interest evinced by the Home Secretary, and Sir Francis Palgrave, upon that Occasion.

Birthright, by esteeming it to have been derived to you from Enactments made in Parliament. Be persuaded that Parliament could not have existed if Freedom had not preceded. It may be that,—here and now,—in this England of the Nineteenth Century,—Freedom itself would perish, if Parliament should now cease to be. We have the unsuspected Authority of Montesquieu, for holding that to be a highly probable Event, in the terrific State to which usurping Centralisation has reduced us. But, if this be so, it is by Reason of our own Corruption, which unfits us to understand our own Laws, and to derive from them the Remedies of which we stand in Need. The Liberties and Franchises of England will be Once more secure, as in the Days of Old, whensoever the Spirit of those Days is restored unto us.

Then, Royal Edicts, and Parliamentary Enactments, were but occasional Manifestations ;—representing outwardly, and illustrating in Practice, the great and broad Truths of the Moral Law ; derived from their Divine Source, by the constant Tradition of Ages, and hallowed and fortified by pure Religion. Then, the Maintenance, or Destruction,—the Existence, or Non-Existence,—of a Thousand Parliaments could not have been of any Consequence. Then, whether Parliaments were known or not, the Rights and Franchises of the Community, and those of Individuals, could not but have flourished, and waxed strong ;—so long as those Traditions were preserved amongst the People, being covered by the avenging Care of Rome, their Foster Mother.

But, now, Written Laws have undermined the Morals of the State. Now, Statutes, and Parliaments, have supplanted the antient Franchises of England, in the Estimation of Englishmen. Now, the Commons of Parliament have virtually disfranchised the Commons of the Realm, “uncreated their Creators,” and destroyed the Rights of

the very Men who sent them into Parliament (*t*). The Forms may have been preserved, but the Meaning of them is lost, and their Action perverted. "The Service of the House of Commons," it was most profoundly observed, upon a great and solemn Occasion (*u*), "was formerly a real Service; therefore often declined; and always paid for by the People. It is now no longer paid for by the People; and, so far from being declined, that it has been courted and sought after, at great Expense." The Service ceased to be a real Service, when the Parliament began to be regarded as the only Bulwark of English Freedom; having been permitted to destroy every other. "Much Reason have they to maintain that Freedom!" said Montesquieu—"should they chance to lose it, they would become One of the most slavish Peoples of the Earth." Then, what will it avail them, that Lord Burleigh's Apophthegm, praised by Blackstone, shall have come true? "England can never be ruined except by a Parliament?" Alas! Her Parliaments have taken Care, that, if none beside them have the Power to ruin Her, none shall have the Power to save Her from their Hands.

Far less sanguine was Sir William Temple's Expectation of the Results which Parliaments were, in modern Times, likely to achieve,—or of the Vocation to which the Progress of Events tended to ordain them. "Parliaments alone," he said, "cannot save,—but Parliaments alone may ruin a State." It is a Proposition, which our later Experience does neither gainsay, nor qualify. Nor was it

(*t*) For the whole of this remarkable Expression, see the Speech of Lord Chancellor Loughborough, in the Debate on the Duke of Bedford's Motion of the 30th of May, 1797; in XXXIII. Parl. Hist. p. 765; and XXXIX. Ann. Reg. p. 265.

(*u*) Protest of the Twenty-Six Peers, on the Resolution against committing the Pension-Bill, 21st March, 1730. • VIII. Parl. Hist. p. 797.

long after that great Statesman had so forewarned his Country against the destructive Tendencies of Parliaments, that One Parliament brought in Two successive Lines of foreign Princes to the British Throne, and the Poison of 1688 into the Hearts of the British People.

It is a vulgar Saying—that—as with the regal Prerogatives, so with the popular Franchises and Liberties,—none do, or can, or ought to exist, but by Parliamentary Title. Thus lamentably has the Meaning of our antient Liberties—Liberties, emphatically, of the Subject—been obscured, in the Minds of Men. The Prerogative of the King trained the Growth of the Franchise—the Prerogative of the Church sheltered and defended it. It was the Liberty, or Franchise, of the Subject,—a Liberty enjoyed under Obedience to the Sovereign—a Liberty subjected to the Laws of which the Sovereign was the Oracle and Head. By the Sovereign alone those Laws could be interpreted and enforced. To this Day, it is the Queen, who, as the Head of the Law, in the familiar Language of every Act of Parliament, makes the Act Law ;—Her Parliament but advising the Enactment. Liberty was sheltered by those Laws. It was supported by that Prerogative. It rested upon no Compact,—nor Parliamentary Code ;—nor written Constitution ;—nor Statute.

That you may the more properly pursue these high Investigations,—be it, above all, your Care, to begin them, with the pure Intention of ascertaining, by Means of them, the Measure of your own Obligation ; so that knowing, you may perform it. You should elevate yourselves, to the Greatness of the Duty, into which you have been born. It is not in the dull Spirit of the impassive and uninterested Observer,—nor in the sordid Sense of One plying a gainful Craft, but in the awful Names of Religion and Law, and under a deep Conviction of your Responsibility, before

God and Man, for the Use you severally make of the Opportunities, vouchsafed to each of you, for knowing and practising the Duties which they command, that you have now to enter upon that Study. For it is at once the earliest of those Opportunities, and the most immediate of those Duties! Do not inflict so much Dishonour, in the Eyes of all Men, upon that Holy Church, which permits you to call Her Mother, as to imagine that She can see, without Abhorrence of Her Children's Guilt, their Indifference to the Welfare of their Country, exemplified in their heedless Ignorance of its Laws. Be assured, that the great moral Truths,—imparted for your Guidance in your Dealings amongst yourselves,—were intended to direct you in all the Relations of Life. If they are equal to the Conduct of your personal Concerns, they must be equal to that of the Nation. They bind at least as strongly in Regard of the Matters of greater Moment, as they do in Regard of the smaller Things entrusted to your Care.

Beware of the Man, who sets other Considerations before you. Let him discourse as he will of Doctrine, or Utility, or Interest. But be not you deceived by Words. If he refuses to reduce the Transactions of the State, and the moral Relations of its Citizens,—towards it, and amongst themselves,—to the plain and simple Rules of the Gospel,—if he sees, in those Transactions or Relations, more or less than Right on the One Hand, and Wrong on the Other,—this to be shunned,—that to be embraced,—you behold a Miscreant in that Man,—and, if he teaches others so, a Seducer.

The Love of Country is but a barren Mockery and Form, in those who do not place it at the Head of all their tenderest Affections, and their Duty to their Country above all the Duties which they owe to Man. It is not that I depreciate—far may I be from depreciating—the nearer and closer

Ties which constitute the Family. Those are the First Obligations ;—the Engagements which lie next to every Man ; and which he must satisfy, fully, and with all his Strength, in Order to qualify himself to undertake the Performance of his Duties to the Community. But, when the immediate Duties have been discharged, and discharged they must be,—those more remote Ones,—but not less indispensable,—require, in Turn, their Fulfilment, and require it in Terms which brook not Denial. The Love of Country contains within itself all the Charities,—and the Duty to Country, all the Duties,—of earthly Life. Let those which belong to Household and to Kindred be made the Groundwork. Let those to which your Country prefers such Claims complete and crown the Edifice.

In the full Perception of these Thoughts, I now, briefly, and for the last Time, recapitulate the main Outlines of the English Constitution. You will bear them in your Minds, and improve them ;—in the Interval which must elapse, before we meet again, to enter upon a Course of Study, to which that which is now ended, has been, I trust, a not unprofitable Introduction.

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Government belongs to the Sovereign ; to be exercised by, and with the Advice of, the Privy Council, together with the frequent Use of the Great Council of Parliament.

Other Standing Councils of State there are None. When the Cabal, or Cabinet assembles, it acts in Defiance of the Law. Its Deliberations are Conspiracies. Its Mandates are Usurpations upon Government ; and it is criminal to obey them.

Parliament, in Reality One Body, though assembled in Two Houses, is the Highest of the Sovereign's Councils of State, because it is also the Highest Court of Justice. To it belong the Functions of Advice and Control. "We are,"

said Mr. Grattan, "His natural Council, and have a Right to advise Him" (u). That Trust it is bound to exercise indifferently and impartially; unbiassed by the Crown; unswayed by party Predilections; mindful that each Member there is the Queen's sworn Servant. It can initiate Nothing that belongs to the Executive,—it can disturb nothing but upon Cause shown and approved,—it cannot remove a Minister by its Vote, nor, without Reason, address the Sovereign for his Removal,—and even when it censures his Measures, that Censure is not to be interpreted a Defeat, making the Ministerial Resignation necessary. Nor has Parliament any Voice in the Nomination of Ministers; far less the Power to arm them with a previous Confidence. The mere Changes of Administrations have no Value for the Queen's High Court and Council of Parliament. It is only with Measures that it has to deal; and that calmly, and impartially, and with the Respect for Law and Right which befits the Judicial Capacity.

Every Man in England, of whatsoever Degree, and of whomsoever Tenant, owes Service and Council to his Sovereign, in every Court; according as his Franchise, or the Emergency shall indicate, or the Royal Writ require. The High Court of Parliament, the County Court, the Court Baron or Leet, and the several Courts of exempt Jurisdiction,—distinguished as to their respective Powers and Pre-eminences,—have this in Common, that each possesses a civil and a political Jurisdiction, of a Magnitude proportionate to the Measure of its Judicial Capacity. The Machinery is unbroken still. Let the Queen ordain the Application.

"Parliaments alone cannot save, but Parliaments alone may ruin the State." The People have their delegated Representatives in the Court of Parliament. For sundry

\* (u) Speech on the 3rd May, 1819, on moving for the Committee on Catholic Claims. LXI. Ann. Reg. p. 56.



settled and determined Purposes, that Court of Delegates has the Power to bind them by its Votes. Within those Limits, the Act of the Parliament is, and must be taken to be, the solemn Act of Every Man in England. But the Law, which confers the Power, binds the Delegate to employ it for the common Profit, and binds the Constituent to watch it, and to shield it from any Abuse. Nor can the Delegate exceed his Commission. There are Reservations, which it depends not upon the combined Pleasure of himself and his Constituents to cancel; and, when they attempt it, their Act is a Nullity; or else it operates to release the Subject from his Allegiance, and to effect the Dissolution of the State.

Senators can frame Statutes for the Furtherance of Crime. Parliament can declare its Utility. But the Judges of the Land, standing upon the high Ground of Natural Right, and disdaining to bend to the lower Doctrine of Expediency, will declare, that it is the Subject's Duty to disobey those Parliaments,—and to transgress those Statutes,—and that Crime and the Law are not and never can be reconciled (*x*).

They are the Vicegerents of the Sovereign, in their daily Dispensations of Public Justice. To them the Guardianship of Law hath been specially confided, in the Name, and for the Honour and Dignity, of the Crown; whereof that sacred Trust is the sole and undoubted Prerogative, and the brightest of the Ornaments. Neglect of Law becomes the Disparagement of Majesty;—and Malversation, the highest of Treasons. For Treason against the Person of the Prince is High Treason, and the Highest Treason that can be,—to Man;—but it falls short of this Treason against the State (*y*)!

(*x*) *Per* Lord Wynford, in *Forbes v. Cochrane* (2 B. and Cr. 470).

(*y*) Mr. Sergeant Maynard's Speech before both Houses of Parliament on the 24th of March, 1641; in the Strafford Impeachment.

## NOTE TO THE FIFTH LECTURE.

*The following Note to pp. 301—16, was omitted by Accident.*

The illegal Practice of secret Cabinet Councils has of late gained a Footing in other Countries, but, with one Exception, nowhere so firmly as in England. The Exception is Russia. Cabinets have been the Practice there from the Time of Peter the Great; and they have attained there to a Degree of Perfection, which, in the equally depraved, but less intelligent Government of England, they have never reached. In Russia, the Cabinet never, for One Moment, lost Sight of the End of its Institution. That End was arbitrary and irresponsible Power, and the Means to that End were the Secrecy of the Cabinet. That Power was attained, and by the Means projected. But, it was not the Czar,—it was the Cabinet which profited of the Attainment. Unlike the Cabinet of S. James', the Cabinet of S. Petersburg is permanently constituted, of Men all having in View the same Aims, all equally conscious of the Nature and Quality of their Acts, all gifted with the same Intelligence. Their Choice,—for it is they who select new Members,—is not confined to Muscovites. The only Qualifications demanded are of an intellectual and moral Character;—and, in Fact, some of the most important of their Body, in that Regard, have been and are Foreigners; who merited Employment in Russia by secret Services rendered to Her, in and at the Expense of their own Country, so long as Opportunity offered. In this Way they perpetuate their Corporate Existence unto an Immortality of Power and Crime. The Empire is in their Hands :—the Czar is their Instrument. Willing or reluctant, intelligent or unconscious,—of his Fidelity they are always secure;—for his Life is the Hostage. In this Country, we attribute every Thing to the personal Character of the Czar;—but that is a great Error. It is not Nicholas,—it is the Czar that acts :—not the mortal Man, but the immortal Functionary;—the Czar in the Hands of the Cabinet. “ Were this Man dead, you would soon make unto yourselves another Philip.”

Attempts have been made, at several Times, by the Privy Council, of State and Nobles of the Muscovite Empire, to abolish the oppressive and unprincipled Dominion of that hateful Oligarchy of Stran-

gers ;—but hitherto all have failed. The following contemporary Narrative of an early Attempt of that Kind will be found the more interesting, because, although written on the Spot, the Author either did not comprehend the Events he described, or was careful to conceal what he comprehended.

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“ March 1730.—The Privy Council of *Russia* (with what Views is not very well known) enter'd upon a bold Attempt, no less than altering entirely the Frame of that Government. It seems they sent, by the Deputies, who were appointed to acquaint the Czarina [*Anne*] with her Accession to the Crown, the following Articles, which they obliged her to Sign. 1. That her Czarian Majesty would govern in Concert with the said Council. 2. That she would not make Peace nor War without their Approbation. 3. That she would not raise Contributions, lay Taxes, or dispose of any considerable Office, without their Consent. 4. That no Nobleman should be condemn'd or executed, unless it plainly appear'd that he deserv'd such Punishment. 5. That Gentlemen's Estates should not be confiscated, till due Proof was made of the Crimes laid to their Charge. 6. That the Czarina should not dispose of, or alienate the Crown Land, without the Consent of the Privy Council. And 7. That she should not marry, nor name her Successor, without the Approbation of the said Council.

It was also said, that the Privy Council, the Generals, and Nobility, had resolv'd to make the following Propositions to her Czarian Majesty. 1. To establish a Privy Council of Twenty One Members. 2. To form a Senate of Eleven Persons, to take Care of sundry Affairs for the Ease of the Privy Council. 3. That such as stood for Members of the Privy Council, or of the Senate, or to be Governors or Presidents of the respective Colleges, should draw Lots, being first recommended by the Generals and Nobility ; the Number of those that drew Lots not to exceed 100, among whom, there should not be more than Two in a Family. 4. That in this Non-admission of more than Two in a Family into the Council or Senate, there should be an Exception nevertheless of those that are actual Members of either. 5. That the Privy Council and Senate should deliberate jointly with the Generals and Nobility in the Affairs of the greatest Importance ; as in amending and renewing of the old Laws, and in the making of New ; to find out proper Expedients for engaging the Nobility to enter into the Service ; not to force any Person

into the Service, nor oblige Gentlemen to go to sea, or to learn Trades against their Will. 7. To ease the Clergy and Burghers in Relation to the Quartering of Soldiers, and likewise the Peasants in the Article of Contributions. 8. To make a Regulation concerning the Promotion and Payment of the Troops, that they may be punctually paid at the Times appointed. 9. As for the Primogeniture with Regard to the Succession of the Empire, that the same should be taken into Consideration the First Opportunity.

But, Yesterday Morning, General *Trubetzkoy* and Prince *Alexis Czeskaski*, a Senator, follow'd by 390 Gentlemen, went to the Palace, and desired that the Czarina would be pleased to hear what they had to say. Her Czarian Majesty sent immediately to acquaint the Privy Council herewith, and to command their Attendance in the great Hall of Audience: At the same Time she order'd Lieutenant Colonel *Soltikoff* of the Guards to take Care to prevent all Disorders; whereupon, that Officer doubled the Guards, and secured all the Posts and Avenues. As soon as the Privy Council were met in the Hall of Audience, the Czarina seated herself upon the Throne, and order'd the Captain of the Guard upon Duty to obey no Orders, but such as came from Lieutenant-Colonel *Soltikoff*: Which being done, General *Trubetzkoy* enter'd, with all those that were with him, and presented a Memorial to the Czarina to this Effect. 'That in Regard the Articles her Czarian Majesty had sign'd, contain'd divers Things which might be prejudicial to the Empire, they desired her Czarian Majesty would permit them to take into farther Consideration the Form of the future Government.' Which the Czarina granted, adding, that she should be glad to hear the Result of their Deliberations the same Day. Her Majesty kept the Members of the Privy Council to Dine with her; and after Dinner, General *Trubetzkoy* came into the Hall of Audience again with his Followers, and told her Majesty, 'That after mature Consideration, they had come to a Resolution, that the Monarchical Government was the only one that suited the *Russian* Empire, and therefore they begg'd her Czarian Majesty would be pleas'd to accept of the Sovereignty entire, and with the same Authority as it was possess'd by her Predecessors.' Whereupon the Czarina answer'd them, That it was her Intention to govern her Subjects in Peace and in Righteousness; but that as she had sign'd certain Articles, she was desirous to know, whether the Privy Council would consent to her Acceptance of her People's offers.

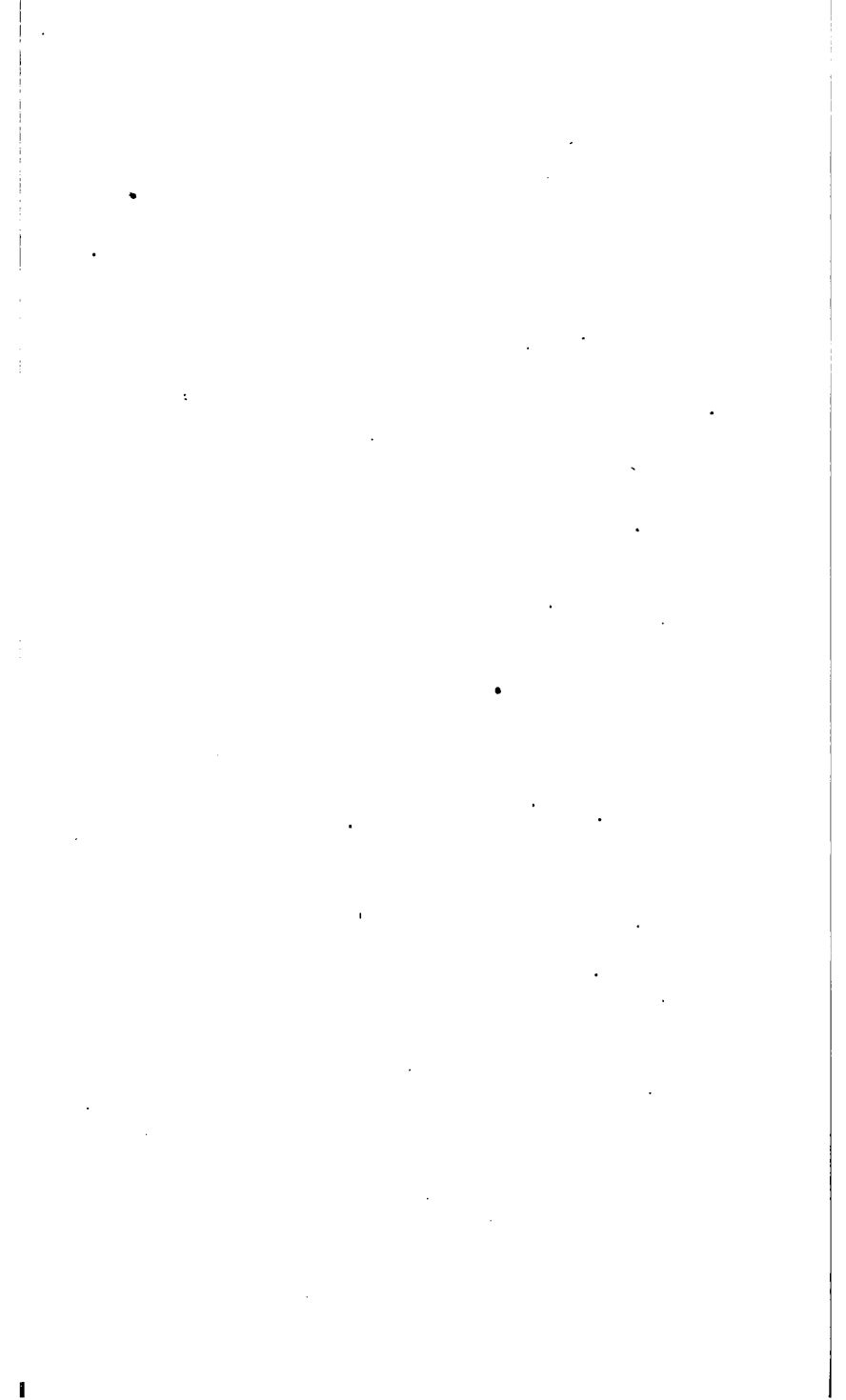
The Members of that Council having signify'd their Consent by bowing their Heads; the Czarina accepted of the Sovereignty, and order'd the High Chancellor to bring the Articles she had sign'd, which being done, they were torn in Pieces before them all. Afterwards her Czarian Majesty made a most gracious Speech, wherein she promised, among other Things, that she would be a true Mother of her Country, and do all the Good she could to her Subjects; and lastly, she sent to General *Jagorzinski*, and return'd him his Sword, and the Ensigns of his Order. Her Czarian Majesty has receiv'd the Compliments of Congratulation of all the Foreign Ministers on this Occasion.

The Family of the *Dolgorouki's*, who by the Marriage of their Kinswoman to the late Czar, seem'd Masters of the Imperial Power, has been thrust down as it were in a Moment, to the very depth of Disgrace and Adversity. It may reasonably be supposed that the Scheme for abridging, for the future, the absolute Power of the *Russian* Monarchs came from their Forge, they having so much Reason to apprehend; under a new Sovereign, the Ruin which is now come upon them. It was a bold Step, and was near succeeding; but being disappointed, was for that Cause the more likely to fall heavy upon the Contrivers. The Czarina had not been settled in her State Two Months when the following Declaration came out.

*[Here follows the Czarina's Declaration concerning the Disgrace and Banishment of the Princes Dolgorouki.]*

The Princes mentioned in this Manifesto have been sent away to the Places of their respective Confinements; but the Princess, the late Czar's Bride, and the other Princesses of that Family, are to continue in several Monasteries about *Moscow* 'till further Orders: The first of which, has it seems, asked and obtained Leave to make a Convent her Abode for the rest of her Days.

Since this, no material Occurrence has fallen out in this great Monarchy, which seems to rest in the utmost Tranquillity." (XV. Hist. Reg. for 1730, pp. 284—291.)



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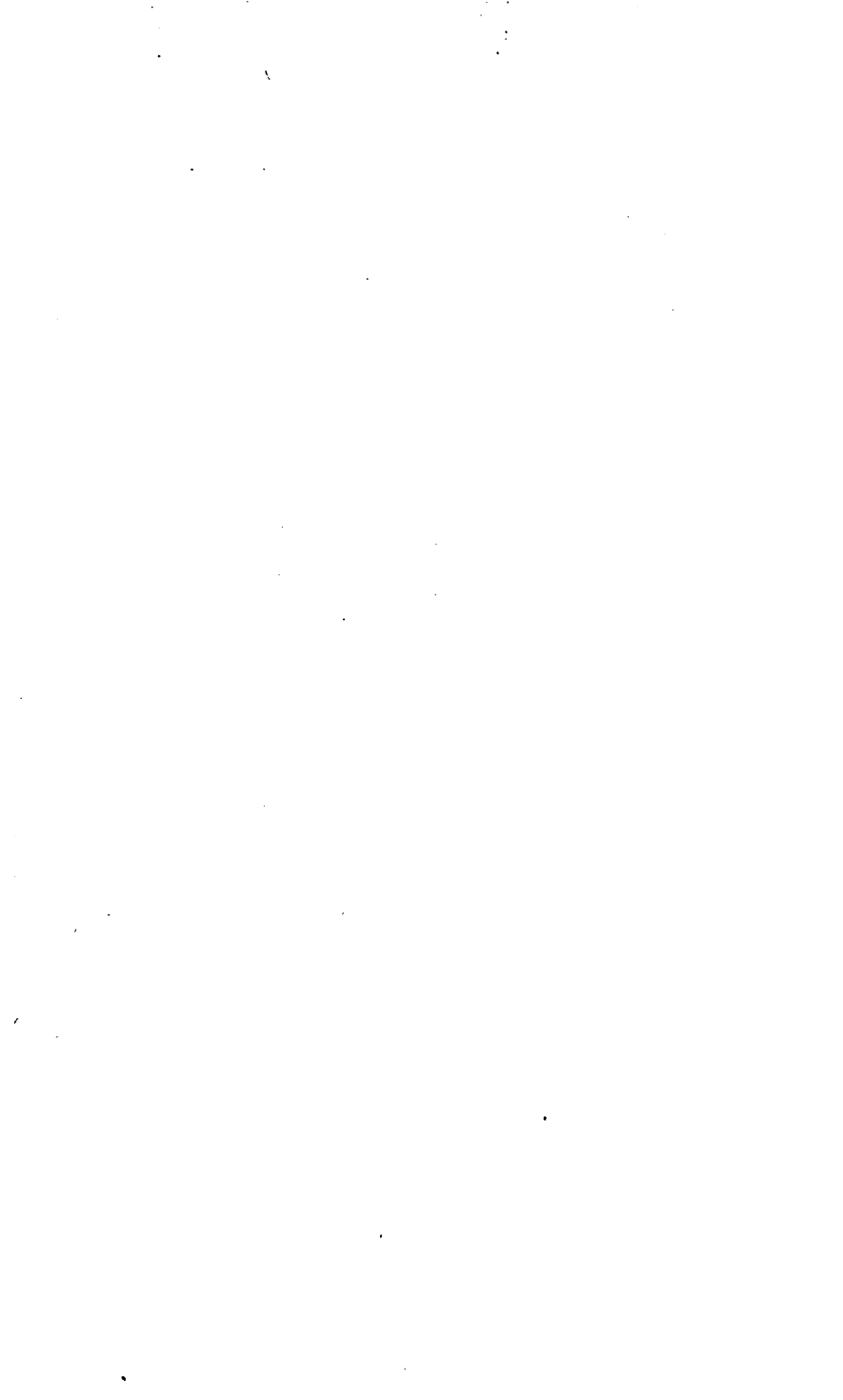
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